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RELEVANT DOCKET ENTRIES

Date
1969

Aug. 1—1. File Complaint.

Aug. 1—Issue Summons.

Aug. 1—2. File Pltf's. Motion for preliminary injunction, with memo.

Aug. 1—3. File Summons with acceptance of service by Robert Backstein, atty. for defts.

Aug. 4—4. File copy of Notification and Certificate to Hon. Richard H. Chambers from Judge Craig re 3 judge appointments.

Aug. 11—5. Enter and File Order designating Hon. Walter Ely, U. S. Circuit Judge, Hon. Walter E. Craig and Hon. William P. Copple, U. S. District Judges as THREE JUDGE court to hear and determine this cause; R. Chambers.

Aug. 22—6. Enter and file Order that Petition for Preliminary Injunction is set for hearing Friday, Oct. 31, 1969 at 10:00 a.m. in Courtroom 1, before Judge Walter Ely, Walter E. Craig, and Wm. P. Copple.

Aug. 22—Copies Order of 8/22/69 mailed to Judge Walter Ely, Attorneys Gust, et al and Robert Backstein, and copies delivered to Judge Copple and Judge Craig.

Oct. 24—7. File Pltf's. First Amended Complaint.

Oct. 24—8. File Defts'. ANSWER to First Amended Complaint.

Oct. 24—9. File Stipulation; and Enter and File Order that the Clerk remove all exhibits attached to the original complaint in this case and attach such exhibits to the First Amended Complaint.

Oct. 24—10. File Stipulated Statement of Facts.

Oct. 27—11. File Defts'. objection to Motion for Preliminary Injunction, with memo.

Oct. 27—12. File Defts'. affidavit of mailing.

Oct. 27—13. File Pltf's. Reply memorandum.

Oct. 31—Minute Entry: This case called for hearing before the 3 judges on Pltf's. Motion for preliminary injunction. Fred H. Rosenfeld, Fred W. Rosenfeld, Jane Rex Greer pfds. for pltf. Alan Polley present for defts. Counsel stipulation that this will be a full hearing on the merits and not only a hearing of pltf's. Motion for preliminary injunction. Order matter submitted and taken under advisement; u/a.

Nov. 25—14. File OPINION and Enter and File Order that the defts. will be permanently enjoined from the issuance of any securities purortedly authorized by the challenged election, and the pltfs.' counsel will submit a proposed form of judgment. (dated 11/17/69); WE, WEC, & WPC

Nov. 25—Copies of opinion and order mailed to Gust et al, City Atty. and Atty. Gen.

Dec. 17—15. File Reporter's Transcript of proceedings dated Oct. 31, 1969. (with copy)

Dec. 17—16. Enter and File Judgment that Article 7, Sec. 13, Arizona State Constitution; Article 9, Section 8, Arizona State Constitution; Title 9, Section 523, Arizona Revised Statutes; and Title 35, Section 455, Arizona Revised Statutes; are violative of the 14th Amendment to the United States Constitution insofar as said sections of the Constitution of the State of Arizona and satutes of the State of Arizona restrict elections to real property taxpayers who are qualified electors of the subdivision and is further ordered that the special election held on June 10, and pursuant to City of Phoenix Ordinance #S-4747, be declared, and the same is declared, to be null and void and have no force and effect; Further ordered that all of the above captioned defts. etc. be and they are permanently enjoined from taking any further

action to sell or issue any bonds purportedly authorized by the special bond election held on June 10, 1969; 3 judges.

Dec. 17—Copies of judgment mailed to Gust et al, City Attorney and Atty. General.

Dec. 19—17. File Defts'. Notice of appeal to the Supreme Court of the U. S., with proof of service upon Gust et al. (copies to 3 judges)

Dec. 22—Record on appeal transmitted to Clerk, U. S. Supreme Court, Washington, D. C.

Jan. 9,—1970 Record on appeal hand carried to U. S. Supreme Court by Rex Lee (original record having been lost on 12/22/69 in the U. S. Mails), this date.

APPENDIX

Supreme Court of the United States

OCTOBER TERM 1969

No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN F. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

FILED JANUARY 12, 1970

PROBABLE JURISDICTION NOTED FEBRUARY 24, 1970

GUST, ROSENFELD & DIVELBESS
300 Security Building
Phoenix, Arizona 85004
252-6547
Attorneys for Plaintiff

IN THE

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI, Plaintiff, vs. CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN F. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona, Defendants.	NO. Civ 69-335 PHX.

FIRST AMENDED COMPLAINT

Plaintiff, for her cause of action, alleges as follows:

I.

The jurisdiction of this Court over this action is invoked under Title 28 U.S.C. 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $10,000 and arises under the Constitution and laws of the United States, and particularly under the Fourteenth Amendment to the Constitution of the United States, 28 U.S.C. 1331.

II.

This is also an action to redress by injunctive relief the deprivation, under color of State law, of rights, privileges and imunities

secured to plaintiff by the Constitution of the United States, and particularly the Fourteenth Amendment thereto, R.S. 1979, 42 U.S.C. 1983.

III.

The jurisdiction of this Court is, therefore, further invoked under Title 28 U.S.C. 1343 (3) (4), this being an action, as aforestated, authorized by the laws of the United States to redress by an action for injunctive relief the deprivation, under color of State law, of rights, privileges and immunities secured to plaintiff by the Constitution and laws of the United States.

IV.

This is also a case where the plaintiff is seeking a declaration of her rights under the Constitution and laws of the United States, and under Title 28 U.S.C. 2201, 2202. This Court in a case of actual controversy within its jurisdiction may declare the rights of plaintiff seeking such declaration.

V.

This is also an action which seeks injunctive relief restraining the enforcement, operation and execution of a state constitutional provision and state statutes by restraining the action of officers of said State in the enforcement and execution of such constitutional provision and statutes upon the ground that the state constitutional provision and statutes on their face and as construed and applied to this plaintiff, violate the provisions of the Fourteenth Amendment to the United States Constitution and, therefore, pursuant to Title 28, U.S.C. 2281, 2284, the application for such injunctive relief should be heard and determined by a district court of three judges.

VI.

That plaintiff is a resident of the City of Phoenix, Maricopa County, Arizona, and is now and was on June 10, 1969, a qualified elector thereof but is not now nor was she on June 10, 1969, a real property taxpayer of said City.

VII.

That the corporate defendant, the City of Phoenix, Arizona, is a municipal corporation organized and existing under the laws of the State of Arizona, that the individual defendants are members of the City Council of the City of Phoenix, Arizona.

VIII.

That Plaintiff, though not an owner of real property, rents her place of abode, that Plaintiff shares in the responsibility for the payment of real property taxes with all other residents of the City of Phoenix, that Plaintiff pays real property taxes levied upon her place of abode, and water charges, through payment of her rent, that increased real property taxes and increased water charges will necessarily increase Plaintiff's future rental costs. That for these reasons, and for other reasons, Plaintiff, and others of her class are interested in and affected by the results of the election.

IX.

The Federal question arising herein is the violation of Plaintiff's rights protected by the Fourteenth Amendment of the United States Constitution.

X.

That the defendant, City of Phoenix, did cause an election to be held on June 10, 1969, for the purpose of presenting to the real property taxpayers of the city, who are also in all respects qualified electors thereof a number of questions pertaining to the issuance of municipal utility revenue bonds, municipal nonutility (airport) revenue bonds and municipal general obligation bonds in the total aggregate amount of $173,000,000 to accomplish certain specific city purposes.. The types of bonds to be issued, the amount of money to be raised and the purposes to be accomplished are set forth in Ordinance No. S-4747 as adopted by the Council of defendant City on May 5, 1969, which ordinance contains a form of ballot which is identical in content to the

ballots made available to those permitted to vote in the aforementioned election. Said ordinance, marked Exhibit A, is attached hereto and made a part hereof.

XI.

That in order to vote in said election the defendant City required each person desiring to vote to execute an affidavit stating that said person was a qualified elector and also a real property taxpayer of the City. Plaintiff, being unable to sign such an affidavit, did not vote in the election.

XII.

That said election was held and the returns canvassed in accordance with the existing laws of the State of Arizona. That a majority of the persons voting in said election voted in favor of the issuance of the bonds for each purpose specified in the ballot.

XIII.

That after the holding of said election and prior to the canvass thereof, the United States Supreme Court declared invalid elections held wherein the franchise to vote excluded otherwise qualified electors.

XIV.

That in limiting the right to vote to qualified electors who were also real property taxpayers thereof, defendant selectively disenfranchised plaintiff and all others of her class from voting in said election, that defendant's actions thus deprived plaintiff and all others of her class the right to vote, which right is protected by the Fourteenth Amendment to the United States Constitution and therefore said election is void.

XV.

That Plaintiff is informed and believes, and upon such information and belief alleges, that unless restrained by order of this Court, that the City Council of the City of Phoenix, Arizona, will undertake to institute further proceedings, all of which will lead

to the sale and issuance of bonds, as authorized at the June 10, 1969, election.

XVI.

That by selling and issuing said bonds, the City of Phoenix, through the operation of its water department, airport and through the levy of general ad valorem taxes, may be obligated to increase water charges, increase airport rentals and miscellaneous charges and may cause additional taxes to be levied to retire the bonds and Plaintiff will be directly or indirectly affected by said increased charges, rentals and taxes; that in the alternative, in issuing said bonds, which are void, the defendant will injure and damage the good name, reputation, financial standing and credit rating of the defendant City, thus adversely affecting the City's future borrowing ability and capacity and causing the City to pay increased costs on all future municipal obligations. That Plaintiff and all others of her class and all residents of the City of Phoenix will therefore suffer irreparable damage for which Plaintiff has no plain, speedy and adequate remedy at law in either the courts of the State of Arizona or in the courts of the United States.

That unless an injunction is issued herein within a relatively short time, enjoining defendants and each of them from selling and issuing all bonds authorized by the aforesaid June 10 election, which bonds are void, plaintiff will suffer the damages alleged above.

WHEREFORE, Plaintiff prays:

1. That a three-Judge Panel be convened in accordance with Title 28, Section 2281, and following, United States Code.

2. That the Court adjudge and declare to be in violation of the Constitution of the United States, and therefore void, all provisions of the Constitution and statutes of Arizona which require the ownership of property and the payment of taxes thereon a condition of voting in certain elections in the State, and adjudge and decree the election held by the City of Phoenix on June 10, 1969, to be null and void.

3. Issue a preliminary and permanent injunction:

(a) Restraining Defendants, and each of them, from enforcing, executing, administering, or in any manner giving effect to the provisions of the Constitution and statutes of Arizona, and to any city ordinances adopted pursuant thereto, which require the ownership of property and the payment of taxes thereon a condition of voting in certain elections in that State.

(b) Restraining Defendants, and each of them, from issuing any bonds authorized at the election held on June 10, 1969.

4. Grant plaintiff such other and further relief as may be just and equitable.

Respectfully submitted this 24th day of October, 1969.

GUST, ROSENFELD & DIVELBESS
By

Copy Delivered to Alan Polley,
Assistant City Attorney, Phoenix, Arizona
at —— o'clock —.M., this
24th day of October, 1969.

County of Maricopa)
) ss.
STATE OF ARIZONA)

EMILY KOLODZIEJSKI, being first duly sworn, upon oath deposes and says:

That she is the plaintiff in the above and foregoing Complaint and knows the contents thereof; that the matters and things therein stated are true to her own knowledge, except those matters stated upon information and belief, and as to those, she believes them to be true.

_____

SUBSCRIBED and sworn to before me this 23rd day of October, 1969.

_____

Notary Public

My Commission Expires: Sept. 12, 1972.

A copy of the foregoing mailed
this —— day of October, 1960,
to:

HONORABLE GARY K. NELSON
Attorney General
State Capitol Building
1700 W. Washington Street
Phoenix, Arizona

_____

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI,
Plaintiff,
-vs-
CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN F. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,
Defendants.

NO. Civ 69-335-PHX.

ANSWER TO FIRST AMENDED COMPLAINT

Defendants answer the first amended complaint heretofore filed herein by alleging that certain bond election held June 10, 1969 in the City of Phoenix contained propositions relating to revenue bonds and general obligation bonds and defendants admit all allegations of said complaint as they relate to revenue bonds, but insofar as the allegations of the complaint relating to general obligation bonds, defendants admit, deny and allege as follows:

I.

Answering the allegations of Paragraph I of said complaint, it is denied that the matter in controversy involves more than the sum of $10,000 or any other sum of money or that it arises under

the Constitution of the United States or involves any Federal question under the Constitution of the United States.

II.

Deny that this action arises under the Constitution of the United States and deny that there has been any threat of deprivation under the color of any Statute or Constitutional provision of the State of Arizona of any right, privilege or immunity secured to plaintiff or other similarly situated by the Constitution of the United States.

III.

Admit the allegations contained in Paragraphs 4, 6, 7, 8, 10, 11, 12 and 15.

IV.

Deny the allegations contained in Paragraphs 3, 5, 9, 13 and 14.

V.

Answering the allegations of Paragraph 16 of said complaint, admit the allegation that by selling and issuing said bonds, the City of Phoenix through the operation of its Water Department, Airport and through the levying of general ad valorem taxes, may be obligated to increase water charges, increase Airport rentals and miscellaneous charges and may cause additional taxes to be levied to retire the bonds and that plaintiff may be indirectly affected by said increased charges, rentals and taxes and deny each and every allegation therein remaining.

VI.

Answering the complaint as a whole, deny each and every allegation hereinabove specifically not admitted.

WHEREFORE, defendants pray as follows:

1. That a three-judge panel be convened in accordance with Title 28, Section 2281, and following, United States Code.

2. That the Court adjudge and declare all provisions of the

Constitution and Statutes of Arizona which require the ownership of property and the payment of taxes theron as a condition of voting in general obligation bond elections in the State of Arizona and adjudge and decree the election held by the City of Phoenix on June 10, 1969 as related to general obligation bond propositions legal and effective and not in violation of the Constitution of the United States.

3. That no preliminary or permant injunction be issued relating to general obligation bonds.

4. That such further and other relief as may be just and proper in the premises be granted defendants.

Respectfully submitted this 24th day of October, 1969.

ROBERT J. BACKSTEIN
City Attorney

By /s/ Alan K. Polley
ALAN K. POLLEY
Assistant City Attorney
930 Municipal Building
251 West Washington St.
Phoenix, Arizona 85003

Copy of the foregoing Answer mailed this 24th day if October, 1969, to:

GUST, ROSENFELD & DIVELBESS
Security Building
Phoenix, Arizona 85004
Attorneys for Plaintiff

HONORABLE GARY K. NELSON
Attorney General
State Capitol Building
1700 West Washington
Phoenix, Arizona

/s/ Alan K. Polley
Alan K. Polley

STATE OF ARIZONA)
) ss.
County of Maricopa)

MILTON H. GRAHAM, being first duly sworn, upon oath deposes and says:

That he is Mayor of the City of Phoenix, defendant in the above entitled action and knows the contents thereof; that the matters and things therein stated are true to his own knowledge, except those matters stated upon information and belief, and as to those, he believes them to be true.

/s/ Milton H. Graham

MILTON H. GRAHAM

SUBSCRIBED AND SWORN to before me this 24th day of October, 1969

/s/ Helen Ashman

Notary Public

My Commission expires: April 4, 1970

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI, Plaintiff, vs. CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN F. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona, Defendants.	NO. Civ-69-335 PHX. STIPULATED STATEMENT OF FACTS

On June 10, 1969, the City of Phoenix held a municipal bond election and submitted to the electorate qualified to vote therein ten questions involving various amounts of bonds sought to be issued. The election was called and held in accordance with the Constitution and statutes of the State of Arizona relative to such elections.[1]

The ballot submitted to the electorate qualified to vote in said election was identical in content to that contained in Exhibit A

[1] [Provisions of Article 9, Section 8, Arizona Constitution, Article 7, Section 13, Arizona Constitution, 9-782 Arizona Revised Statutes; Section 35-451 and following Arizona Revised Statutes (general obligation bonds) Section 9-521 and following (revenue bonds).]

attached to the Complaint and incorporated by reference into this Statement. Pursuant to the above mentioned constitutional and statutory requirements, said election was restricted to real property taxpayers who were also in all respects qualified electors at the time of the election. The notice of the election similarly gave notice of the election as to all persons who were real property taxpayers and qualified electors (see Ordinance No. S-4747, attached as Exhibit A to plaintiff's complaint which is herein incorporated by reference into this statement.)

I.

In order to vote in said election the defendant City required each person desiring to vote to execute an affidavit stating that said person was a qualified elector and also a real property taxpayer of the City. In order to aid the election boards in deciding whether prospective voters were eligible to vote in said election legal opinions were disseminated to the various voting boards stating the qualifications of those persons eligible to vote. A copy of said opinion is attached to these facts marked Exhibit "1" and incorporated by reference herein.

II.

The plaintiff is an unmarried woman who is neither a widow nor a veteran of service in the armed forces of the United States prior to September 17, 1945; the plaintiff does not own real property within the boundaries of the City of Phoenix and did not so own real property on June 10, 1969. The plaintiff was not required to pay any real property tax at the time of the election.

III

Not meeting the legal requirements to vote in said election plaintiff did not vote.

IV.

Neither plaintiff nor any other person brought any proceedings in any of the state courts of Arizona contesting the June 10, 1969, election.

V.

Plaintiff is interested pecuniarily in the outcome of the election as shown below. Plaintiff is also an interested citizen of the City of Phoenix wishing to take part in the civic affairs of the city and vote in all municipal elections.

VI.

The plaintiff rents her place of abode within the City of Phoenix. Plaintiff pays excise taxes to the City of Phoenix on all items purchased within said City of Phoenix which are subject to said excises. The plaintiff uses the municipal water of the defendant, but the plaintiff does not directly pay water bills, said bills being paid by the landlord of her place of abode; however, the cost of the water service at the plaintiff's place of abode is a normal operating expense of the plaintiff's landlord and is taken into consideration in determining the rental charge plaintiff pays on her place of abode. Plaintiff does not pay real property taxes as aforesaid, however, the amount of money paid as real property taxes is a cost of doing business of the plaintiff's landlord and as such has a material bearing on the cost of the plaintiff's rental payments.

VII.

The redemption of all principal and interest on the water revenue bonds shall be paid solely from water revenues of the city.

VIII.

The redemption of all principal and interest on the airport revenue bonds shall be paid solely from the revenues of the municipal airport operation of defendant city.

IX.

The defendant, City of Phoenix, annually collects and pays into the general fund of the City approximately $22,000,000[2] from various excise, sales and franchise taxes instituted by said city. The

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[2] Source: City of Phoenix, Arizona Annual Budget, Revenue Estimates for Fiscal Year 1969-70, Pg. A-1.

excise taxes paid by plaintiff eventually are paid into the general fund of the City of Phoenix.

X.

All general obligation bonds sought to be issued by the defendant pursuant to the June 10 election are paid from funds paid to the general fund of the City but placed in separate funds designated principal and interest redemption funds respectively. The City of Phoenix annually causes to be levied real property taxes to pay a portion of the cost of the operation of the City of Phoenix, including debt service thereon on all general obligation bonds; however, all monies raised from the levy of ad valorem taxes by the said City of Phoenix are paid into the general fund of the City of Phoenix and commingled therein with the monies accumulated by the institution of excise taxes. After said monies are commingled in said general fund, the City of Phoenix annually pays the debt service when due on its general obligation bonds.

The source of funds for the 1969-70 fiscal year shows $2,350,200 of the annual general obligation debt service requirements of $5,594,937 to be paid through levy of ad valorem property taxes, the remaining $3,244,773 to be paid from other sources. The ratio between real property tax collections and other source monies is representative of the recent years apportionments for debt service on general obligation bonds. Plaintiff directly contributes to all funds raised from sources other than real property taxes, and plaintiff is derivatively affected by the levy of a real property tax insofar as it affects the cost of goods and services.

XI.

On June 16, 1969, the Supreme Court of the United States rendered its opinion in the cases of Kramer v. Union Free School District No. 15 and Cipriano v. City of Houma. On June 23, 1969, the defendant canvassed the result of the June 10 election and declared that each and every question had carried. In holding the election, the defendant's procedure complied in all respects

with the Constitution and laws of the State of Arizona. The defendant intends to institute proceedings for the sale of the bonds authorized by the election held June 10, 1969.

Respectfully submitted this —— day of October, 1969.

GUST, ROSENFELD & DIVELBESS

By _____

Attorneys for Plaintiff
ROBERT J. BACKSTEIN
City Attorney

By Alan K. Polley
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI,
Plaintiff.
vs.
CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITIES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,
Defendants.

No. Civ-69-335 Phx.
OPINION AND ORDER

Before: Walter Ely, Circuit Judge, and Walter E. Craig and Wm. P. Copple, District Judges

PER CURIAM:

The above entitled cause was instituted pursuant to Title 42 U.S.C. Section 1983, Title 28 U.S.C. Section 1343 (3) (4), and Title 28 U.S C. Sections 2201 and 2202.

Plaintiff, a resident of the City of Phoenix, within the District of Arizona, seeks to enjoin the City of Phoenix, a body politic, the Mayor and members of the City Council, from issuing certain bonds approved at a special election June 10, 1969, called for that purpose. The election was duly and regularly called by the City, pursuant to Article 7, Section 13 of the Arizona Constitution, and Title 9, Section 781, A.R.S.[1] (35-452).

[1] Article 7, Section 13, Constitution of Arizona: "Questions upon bond issues or special assessments shall be submitted to the vote of real property

The propositions offered to the electorate were ten in number, the first two related to Revenue Bonds: (1) for the Municipal Water System, $53,900,000, (2) for the Airport and related facilities, $58,900,000. The remaining eight propositions related to General Obligation Bonds: (3) Sewer System, $37,000,000, (4) Parks and Playgrounds, $9,000,000, (5) Municipal Buildings, $1,000,000, (6) Fire Department, $1,200,000, (7) Police and Public Safety Buildings, $4,500,000, (8) Maintenance and Service Facilities, $1,500,000, (9) Sanitary Landfills, $2,250,000, (10) Library, $4,000,000.

Pursuant to the Arizona Constitution and Statutes, the electorate was limited to duly qualified electors who, in addition, were real property taxpayers. Plaintiff is a duly qualified elector of the City of Phoenix, but not a real property taxpayer.

The canvass of the election took place June 23, 1969, and the several propositions were declared to be carried. Under Arizona law the period during which an elector may contest an election is limited to five (5) days following the canvass of the election and the declaration of the results thereof. 16 A.R.S. 1202, 1204.

This action was instituted August 1, 1969, in this Court, no State action having been instituted. A Three Judge Court was convened to hear the matter, pursuant to Title 28 U.S.C. Sections 2281 and 2284. The matter was submitted and argued to the Court upon an agreed Statement of Facts consistent with the foregoing statement.

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tax payers, who shall also in all respects be qualified electors of this state, and of the political subdivision thereof affected by such questions."

Title 9, Section 782, A.R.S.: "When the governing body of an incorporated city or town determines to borrow money under the provisions of this article, the question of issuing bonds under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bond shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose as provided in this article."

We need go no further than *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, and *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, both decided June 16, 1969.

In *Kramer, supra,* the Supreme Court has held that State Statutory and Constiutional provisions prohibiting the exercise of the voting franchise to some electors, while allowing it to others, must be subjected to close scrutiny to "determine whether the exclusions are necessary to promote a compelling State interest." If there is no compelling State interest to be promoted by the exclusion, the Constitutional and Statutory provisions are violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

As in *Cipriano, supra,* we find the challenged Constitutional provision and the challenged Statutes under which the election was held to contain "a classification which excludes otherwise qualified voters, who are as substantially affected and directly interested in the matters voted upon as those permitted to vote." There was no evidence before this Court which would justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest. Moreover, in the instant case we find no evidence which would justify a distinction between Revenue Bonds and General Obligation Bonds.[2]

In *Cipriano, supra,* in order to avoid significant hardships on cities' bondholders and others, the Court held the rule of that case would be applied prospectively, "only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision."

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[2]The defendants concede that *Kramer* and *Cipriano* require that the election be invalidated insofar as it authorized the issuance of Revenue Bonds.

In the instant case the authorization to issue the securities was not legally complete by June 16, 1969, (the date of the *Cipriano* decision) nor had the time expired within which the election could have been contested. In the instant case we find the Arizona Constitutional and Statutory exclusions involved in the election called by the City of Phoenix and held June 10, 1969, to be violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

IT IS ORDERED that the defendants will be permanently enjoined from the issuance of any securities purportedly authorized by the challeneged election, and the plaintiff's counsel will submit a proposed form of judgment.

DATED this 17th day of November, 1969.

WALTER ELY
United States Circuit Judge

WALTER E. CRAIG
United States District Judge

WM. P. COPPLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI,
Plaintiff,
vs.
CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN F. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, members of and constituting the City Council of the City of Phoenix, Arizona,
Defendants.

No. Civ-69-335-PHX
JUDGMENT

The Plaintiff's Motion for Preliminary Injunction having been scheduled for argument the 31st day of October, 1969, and the parties having stipulated that all merits of the case be submitted for final determination at the date set for oral argument, and the Court being fully advised in the premises and the Court having heretofore entered its OPINION AND ORDER.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Article 7, Section 13, Arizona State Constitution; Article 9, Section 8, Arizona State Constiution; Title 9, Section 523, Arizona Revised Statutes; and Title 35, Section 455, Arizona Revised Statutes; are violative of the 14th Amendment of the United States Constitution insofar as said sections of the Constitution of the State of Arizona and statutes of the State of Arizona restrict elections to real property taxpayers who are qualified electors of the subdivision.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the special election held on June 10, 1969, pursuant to City of Phoenix Ordinance #4747, be declared, and the same is declared, to be null and void and have no force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of the above captioned defendants, their successors, agents, or attorneys be and they are permanently enjoined from taking any further action to sell or issue any bonds purportedly authorized by the special bond election held on June 10, 1969.

DATED: This ..... day of December, 1969.

.....
United States District Judge

.....
United States District Judge

.....
United States Circuit Judge

APPROVED AS TO FORM:

ROBERT BACKSTEIN
ALAN K. POLLEY
Assistant City Attorney

CITY OF PHOENIX,
GRAHAM, FRANK G.,
JOHN J. LONG, MILTON
THERIAS, DR. MORRISON,
and constituting the City Council of the
Arizona,

Appellants,

vs.

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the three-judge district court has not yet been officially reported. A copy of that opinion is set forth in full in Appendix A.

JURISDICTION

This is an appeal from the judgment of a three-judge district court invalidating the following provisions of Arizona law insofar as they restrict elections to real property taxpapers who are qualified electors:

Article 7, Section 13, Arizona Constitution
Article 9, Section 8, Arizona Constitution
Title 9, Section 523, Arizona Revised Statutes
Title 35, Section 455, Arizona Revised Statutes

Both the constitutional and statutory provisions have general state-wide effect. This appeal is taken from the judgment of the lower court only insofar as it holds the foregoing provisions unconstitutional as applied to general obligation bond authorization elections. The lower court entered its judgment on December, 17, 1969. The notice of appeal was filed on December 19, 1969. A copy of the judgment from which the appeal is taken is set forth in full in Appendix B.

This court has jurisdiction by virtue of 28 U.S.C. Section 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona Constitution, Article 7, Section 13

Submission of questions upon bond issues or special assesments

Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof affected by such question. As amended, election Nov. 4, 1930, eff. Dec. 1, 1930.

Arizona Constitution, Article 9, Section 8

Local debt limits; assent of taxpayers

No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and towns assessments shall be taken

from the last assessment for city or town purposes; Provided, that under no circumstances shall any county or school district become indebted to an amount exceeding ten per centum of such taxable property, as shown by the last assessment roll thereof; and Provided further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality. As amended, election Nov. 5, 1912, eff. Dec. 5, 1912.

Arizona Revised Statutes, Section 9-523

Bond election

Questions on bond issues under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

Arizona Revised Statutes, Section 35-452

Election to authorize indebtedness; qualifications of electors

A. The governing body or board of a political subdivision enumerated in § 35-451 may, and upon petition signed by fifteen per cent of its real property taxpayers who are qualified electors thereof shall, order an election by such taxpapers and electors to determine whether such indebtedness shall be authorized.

B. The order for the election in a school district shall be made by the board of supervisors in the county where such election will be held, either upon petition or upon request of the board of school trustees.

C. If a majority of the real property taxpayers who are qualified electors voting at the election vote in favor of creating an indebtedness in an amount exceeding four per cent of the value of the taxable property of the political subdivision, such political subdivision may become so indebted.

Arizona Revised Statutes, Section 35-454

Notice of order for election; election; return; canvass of vote; certificate of election

A. The governing body or board of the political subdivision shall:

1. Post at least five copies of the order for election in public places within the subdivision in which the election is to be held at least twelve days prior to the day of election.

2. Post a copy of the order at each polling place therein.

3. Publish a copy thereof in a newspaper for at least thirty days prior to the day of such election.

B. The election shall conform with the general election laws of the state. The return of the election held in a county or school district shall be made to the board of supervisors, and, in any other case to the governing body or board of the municipal corporation within twelve days after the election.

C. The board of supervisors, governing body or board shall hold a special meeting on the first Monday succeeding the twelfth day after the election to canvass the votes cast and certify the result. The certificate of the result shall be prima facie evidence of full performance of all conditions and requirements precedent to holding the election.

D. The governing board or body shall file and record in the office of the county recorder a certificate disclosing the purpose of the election, the total number of votes cast and the total number of votes for and against creating the indebtedness, and stating that the indebtedness is ordered. Upon filing and recording the certificate, the governing board or body shall carry out the purpose of the election.

Arizona Revised Statutes, Section 35-455

Issuance and sale of bonds; call for election

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the

governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by § 35-454, issue and sell bonds in the amount authorized at the election.

The call for the election shall set forth the amount of each bond and the aggregate amount of the bonds, the rate of interest to be paid thereon not exceeding six per cent per annum, when the interest is payable, the date of maturity of the bonds and the purposes for which the money derived from the sale of the bonds will be expended.

QUESTION PRESENTED

Last term, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), this Court invalidated a Louisiana revenue bond election on the ground that only property taxpayers were allowed to vote. The question presented in the instant case is whether the holding in *Cipriano* applies to general obligation bonds, which, unlike revenue bonds, pledge the general ad valorem taxing power of the issuing body toward repayment of the bonds, and constitute an effective lien upon all taxable realty within the taxing district.

STATEMENT OF THE CASE

On June 10, 1969, the City of Phoenix, Arizona, submitted to the persons who under Arizona law are qualified to vote in bond authorization elections, ten separate proposed bonding issues. The first two of these propositions were for revenue bonds, $53,900,000 for the municipal water system, and $58,900,000 for the municipal airport and related facilities. The other eight proposed issues were general obligation bonds. The purpose and amounts of the general obligation bonds were as follows: Sewer system, $37,000,000; parks and playgrounds, $9,000,000; municipal buildings, $1,000,000; fire department, $1,200,000; police and public safety buildings, $4,500,000;

maintenance and service facilities, $1,500,000; sanitary land fills, $2,250,000; library, $4,000,000.

The constitutional and statutory provisions applicable to all bond authorization elections of incorporated cities and towns in the State of Arizona limit the right to vote in such elections to persons who are qualified electors and who are also real property taxpayers. Arizona Constitution, Article 7, Section 13; Article 9, Section 8. Arizona Revised Statutes, Section 9-523 and 35-455. These constitutional and statutory provisions apply to all political subdivisions within the State of Arizona, and not just to cities and towns.

The plaintiff in this case, Emily Kolodziejski, is a resident of the City of Phoenix and a qualified elector, but was not a real property taxpayer on June 10, 1969. Accordingly, she did not vote in the bond election held on that date.

All of the propositions submitted to the electorate on June 10, 1969, were approved by a majority of the persons voting in that election.

The decision of this Court in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), was handed down on June 16, 1969, six days after the City of Phoenix bond election. One week later, on June 23, 1969, the City Council canvassed the result of the election pursuant to A.R.S. § 35-454 C, and certified that each issue had carried.

The appellee filed this action seeking a determination that all provisions of the constitution and statutes of the State of Arizona which require the ownership of property and the payment of taxes thereon as a condition of voting in bond authorization elections are in violation of the United States Constitution. The appellee also contended that the bond election held on June 10, 1969 was null and void, and sought injunctive relief against the issuance of any bonds authorized at that election.

The case was argued on the merits before a three-judge district

court on a stipulated statement of facts. The lower court filed its per curiam opinion and order on November 25, 1969. On December 17, 1969 the court entered its formal written judgment from which this appeal is taken. The appellants have agreed throughout these proceedings that under this Court's decision in *Cipriano v. City of Houma,* the authorizing election was invalid insofar as it relates to the two revenue bond measures. Accordingly, the sole issue in this case is whether the *Cipriano* decision applies to general obligation bonds.

THE QUESTION PRESENTED IS SUBSTANTIAL AND PROBABLE JURISDICTION SHOULD BE NOTED

Municipal bonds are the most important single source of long-term financing for cities, towns, and other municipal subdivisions, both in Arizona and also in many other states. Unavailability of a major segment of this most important source of long-term municipal financing, particularly for a vigorous, rapidly-expanding city like the City of Phoenix can materially impair the City's orderly development and its ability to provide for the legitimate needs of its citizens.

This Court clearly held in *Cipriano v. City of Houma,* 395 U.S. 701 (1969) that a state could not constitutionally limit the right to vote in revenue bond elections to real property owners. The opinion in that case correctly points out that "the benefits and burdens of [revenue bond issues] fall indiscriminately on property owner and nonproperty owner alike." 395 U.S. at 705.

The two principal prototypes of municipal financing obligations are revenue bonds, such as were involved in *Cipriano v. City of Houma,* and general obligation bonds, such as are at issue in this case. The *sine qua non* of general obligation bonds — and the single characteristic which distinguishes them from other bonds — is that the municipality which issues such bonds pledges its general ad valorem taxing power toward their repayment. Revenue bonds may be repaid either from the revenues

derived from the assets financed by the bonds — such as the electric facilities in *Cipriano* — or from some other source, so long as the general ad valorem taxing power of the issuing municipality is not pledged toward repayment. It is generally true that, other things being equal, general obligation bonds can be marketed on terms more favorable to the issuing entity than non-general obligation bonds.

General obligation bonds, therefore, unlike revenue bonds, effectively place a lien for the life of the bonds on all taxable realty located within the confines of the issuing municipality. Arizona Revised Statutes, Section 35-458 provides as follows:

> *"Levy of tax for payment of interest and bonds*
>
> A. After the bonds are issued, the governing body or board shall enter upon its minutes a record of the bonds sold, their numbers and dates, and shall annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and shall likewise annually levy a tax sufficient to redeem the bonds when they mature.
>
> B. Monies derived from the levy of the tax when collected shall constitute a fund for payment of interest and the bonds. The fund shall be kept separately and shall be known as the 'Interest Fund' and 'Redemption Fund.'"

Thus, during the entire life of the bond, the realty of the real property taxpayer is irrevocably burdened by the pledge — and the statutory obligation — of the municipality to utilize its taxing power for the purpose of repaying the bond obligation. The property belonging to non-taxpaying electors is subject to no comparable burden. In *Baker Watts & Co. v. Saxon*, 261 F. Supp. 247, 252 (D.DC. 1966) the United States District Court for the District of Columbia observed as follows:

> "While there is a paucity of judicial authorities on the subject, it was held by the Supreme Court of Oregon, in City of Eugene v. Willamette Valley Co., 52 Or. 490, 97 P. 817,

821, that the phrase 'general obligations' means, 'a municipal debt, for the payment of which provision must be made by devoting funds raised by taxation, thereby appropriating in discharge thereof a pro rata share of the burden upon all property in a specified district that is subject thereto.' No authorities have been cited to the contrary."

The constitutionality of limiting the franchise in general obligation bond authorization elections to those whose property will be taxed in order to repay the bonds was neither raised nor decided by *Cipriano.* As a result of the holding in *Cipriano,* however, municipalities both in the State of Arizona and in other states having similar constitutional and statutory provisions have found themselves in this dilemma:

1. If the *Cipriano* holding applies to general obligation bonds, then the United States Constitution invalidates any bond authorization election at which nonproperty owners were excluded from voting.

2. If the *Cipriano* holding does not apply to general obligation bonds, then the respective state constitutions invalidate general obligation bond authorization elections at which nonproperty owners were allowed to vote.

Within Arizona and states having similar constitutional limitations on voting in bond elections, therefore, it is impossible to hold any general obligation bond election confident that it will not violate either (1) the Fourteenth Amendment because non-property owners were not allowed to vote, or (2) applicable state constitutional provisions, because non-property owners were allowed to vote. As a consequence, until the issue of *Cipriano's* applicability or nonapplicability to general obligation bond elections has been settled by this Court, municipal financing through general obligation bonds in Arizona has come to a complete halt.

The predicament of the City of Phoenix is representative. The bond election of June 10, 1969 was held because of ten specific anticipated needs of the City of Phoenix. These needs still exist. It is imperative that an answer be provided forthwith

concerning *Cipriano's* applicability to general obligation bonds, so that the City of Phoenix, like many others, can either proceed to sell the bonds which its voters have approved, or provide whatever corrective is indicated in light of this Court's decision.

Of the ten issues approved by the voters at the June 10, 1969 election, two involved revenue bonds and the remaining eight involved general obligation bonds. The City does not seek reversal of the trial court's determination that the election was void as to the revenue bonds. Accordingly, the City knows that it must take some other steps to finance its proposed water system and airport improvements.

As to the eight measures calling for issuance of general obligation bonds, *Cipriano's* applicability has not been resolved. The improvements which were to be financed by these bonds — extension of the sewer system, construction of parks and playgrounds, municipal buildings, fire department, police and public safety buildings, maintenance and service facilities, land fills and libraries — are still needed. In some instances, the need is urgent. The City has determined that the necessary facilities are to be financed by the authorization, sale and issuance of general obligation bonds. *Cipriano's* applicability or nonapplicability to general obligation bonds must be resolved in order that the City of Phoenix can proceed either to sale and issuance of the bonds which its voters have already approved, or whether it must hold another election, and perhaps obtain changes in relevant constitutional and statutory provisions.

This is, therefore, one of those cases in which it is imperative that the Court rule. Whether the ruling is in favor of the appellants or the appellee is not nearly so important as is the fact of the ruling itself. If state constitutional and statutory provisions are valid with regard to general obligation bonds, they must, of course, be followed. If they are violative of the Fourteenth Amendment, they cannot be followed. Unable to steer

between the Scylla of Arizona's State Constitution and the Charybdis of the Fourteenth Amendment, municipalities in the State of Arizona have simply stopped holding general obligation bond elections until *Cipriano's* applicability or nonapplicability to such elections is established.

The problem has practical, as well as legal underpinnings. Municipal bonds are unmarketable so long as there is in existence a substantial unresolved question concerning their legality.

We suspect that other states have encountered similar problems. Arizona is not unique in restricting bond authorization elections to property owners. Thirteen additional states — eleven of them by constitutional provision and two by statute — have provisions limiting bond election voting to taxpayers or property owners. These states, and their relevant provisions, are set forth in the following table.

Municipalities, Counties and School Districts Limiting Bond Election Voters to Taxpayers or Property Owners

State	*Authority*	*Issuer*	*Type*
Alaska	Alaska Statutes §07.30.010	Boroughs (including all school and other districts outside of cities)	All
Arizona	Constitution, Article 7, §13	All	All
Colorado	Constitution, Article XI, §§6, 7 and 8	All	General Obligation
Florida	Constitution 1885, Article 9, §6, Constitution 1969, Article 7, §12	All	General Obligation
Idaho	Constitution, Article 8, §3, I.C. §§50-1026, 31-1905, 33-404	All	General Obligation

Louisiana	Article XIV, §14(a) R.S. 33:4251 et seq.	All	General Obligation Revenue (without mortgage)
Michigan	Constitution, Article II, §6	All	General Obligation
Montana	Constitution, Article IX, §2, Article XIII, §5, R.C.M. §§11:2306, 11:2404, 75:3908	All	All
New Mexico	Constitution, Article IX, §§10, 11 and 12	All	General Obligation
New York	Town Law, §84, Village Law §4-402	Towns Villages	General Obligation
Oklahoma	Constitution, Article X, §27	Cities Towns	All but streets, highways and limited access facilities
Rhode Island	Constitution, Article XXIX, §2; Rhode Island Statutes, §16-3-11	Towns Regional School Districts	All
Texas	Constitution, Article 6, §3a	All	General Obligation
Utah	Constitution, Article XIV, §3	All	General Obligation Revenue Bonds (except for new construction or payable from special allocation)

The instant case in the first in which a three-judge district court has passed upon this important issue. The eyes of the municipal financing community in fourteen states are, therefore, trained upon this case. There has been at least one other decision squarely on point by a court of record, and the holding in that case is in square conflict with the holding of the lower court in this case. *Dorris Handy, Jr. v. Parish School Board of Parish of Acadia,* No. 31,923, Fifteenth Judicial District Court, Parish of Acadia,

Louisiana (November 19, 1969), held that *Cipriano* does not apply to general obligation bond elections. Because of the direct conflict between the two decisions, a copy of the opinion in the Louisiana case is set forth in full in Appendix C.

It is well settled that one of the most important factors to be taken into consideration in determining the substantiality of federal questions presented to this Court on appeal is a conflict among the lower courts on the precise question presented. While the conflict in this case does not involve the United States Courts of Appeal nor State Supreme Courts, the conflict is nonetheless real, and reflects the growing concern over this issue among lower courts that have had to deal with it. Significantly, the conflict developed within less than six months after *Cipriano* was handed down.

It is respectfully submitted that the *Cipriano* ruling should not extend to general obligation bonds. The security for such bonds is the pledge by the municipality that it will exercise its property taxing power to repay the bonds. A.R.S. §35-458. It follows that a state has not acted outside its permissible bounds in prescribing that the decision whether property owners are to be taxed for the purpose of repaying the bonds should be left to those who are to be taxed.

The possibility of such distinction appears to have been anticipated by the *Cipriano* opinion. That opinion recognizes and assumes *arguendo* "that a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election. . . ." 395 U.S. at 704.

If the "specially interested" limitation includes anything at all, it must include real property taxpayers in a general obligation bond election. Considering the entire spectrum of voters and potential voters in municipal bond authorization elections, there is no group which could as appropriately quality for the specially interested designation as real property taxpayers in a general obligation bond election.

At the very least, this much is clear: If a "specially interested" limitation is to be recognized — as we feel it should — the dividing line must be drawn between those instances in which the municipality pledges its property taxing power and those in which it does not. If there is any exception at all to the *Cipriano* rule, it must include general obligation bond elections; there is no more clear example of voters being specially interested in the outcome of a bond election than voters whose property is to constitute the source of funds for repayment of the bonds.

That the "specially interested" exception anticipated a distinction between general obligation bonds and other bonds is further strengthened by the following language in the *Cipriano* opinion:

> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." 395 U.S. at 705.

The importance of review by this Court is magnified in the instant case by the fact that unless the lower court's holding is reviewed by this Court, there will be no appellate review at all. The issue in this case — lying as it does at the very heart of municipal financing in more than one fourth of the states — is far too important for the holding of the district court to be both the first and the last word on the matter. A question of this magnitude deserves at least one appellate review.

Finally, it is respectfully submitted that this is a case which not only needs to be decided by this Court, but needs to be decided this term. In the case of the City of Phoenix, even if this appeal is decided by the Court this term, the City's bonding program will be at least one year behind schedule. Inevitably, there

are many other municipalities for whom the urgency is equally great. Accordingly, appellants would have no objection — and indeed request — that the Court note probable jurisdiction, set the case down for argument during the 1969 term, and shorten the time for filing briefs so as to permit argument during this term. Toward that end, appellants represent to the Court that, if necessary, they will file their merits brief within as short a period of time as three weeks from the date of the Court's order noting probable jurisdiction.

While the proposed procedure is somewhat out of the ordinary, we are dealing here with an extraordinary problem.

CONCLUSION

This is the first case to reach this Court raising the question whether the Court's holding in *Cipriano v. City of Houma* applies to general obligation bonds. The decision is in conflict with at least one other holding by a state court.

Pending resolution of the issue in this case, municipal financing in Arizona through general obligation bonds has come to an absolute standstill. We suspect that other states with similar constitutional provisions face similar problems. Municipalities within these states find themselves on the horns of a constitutional dilemma: If *Cipriano* applies to general obligation bonds, it is unconstitutional to prevent nonproperty taxpaying electors to vote; if *Cipriano* does not apply, then it is unconstitutional to permit them to vote. The only solution is for the Court to make a determination so that municipalities within these states can adopt whatever correctives may be necessary, and resume their orderly growth patterns through bond financing which comports with applicable constitutional requirements.

Whatever the answer, it must be forthcoming without delay.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI,
Plaintiff,
vs.
CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,
Defendants.

No. Civ-69-335 Phx.

OPINION AND ORDER

Before: Walter Ely, Circuit Judge, and Walter E. Craig and Wm. P. Copple, District Judges

PER CURIAM:

The above entitled cause was instituted pursuant to Title 42 U.S.C. Section 1983, Title 28 U.S.C. Section 1343 (3) (4), and Title 28 U.S.C. Sections 2201 and 2202.

Plaintiff, a resident of the City of Phoenix, within the District of Arizona, seeks to enjoin the City of Phoenix, a body politic, the Mayor and members of the City Council, from issuing certain bonds approved at a special election June 10, 1969, called for that purpose. The election was duly and regularly called by the City, pursuant to Article 7, Section 13 of the Arizona Constitution, and Title 9, Section 781, A.R.S.[1] (35-452).

[1] Article 7, Section 13, Constitution of Arizona: "Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this state,

The propositions offered to the electorate were ten in number, the first two related to Revenue Bonds: (1) for the Municipal Water System, $53,900,000, (2) for the Airport and related facilities, $58,900,000. The remaining eight propositions related to General Obligation Bonds: (3) Sewer System, $37,000,000, (4) Parks and Playgrounds, $9,000,000, (5) Municipal Buildings, $1,000,000, (6) Fire Department, $1,200,000, (7) Police and Public Safety Buildings, $4,500,000, (8) Maintenance and Service Facilities, $1,500,000, (9) Sanitary Landfills, $2,250,000, (10) Library, $4,000,000.

Pursuant to the Arizona Constitution and Statutes, the electorate was limited to duly qualified electors who, in addition, were real property taxpayers. Plaintiff is a duly qualified elector of the City of Phoenix, but not a real property taxpayer.

The canvass of the election took place June 23, 1969, and the several propositions were declared to be carried. Under Arizona law the period during which an elector may contest an election is limited to five (5) days following the canvass of the election and the declaration of the results thereof. 16 A.R.S. 1202, 1204.

This action was instituted August 1, 1969, in this Court, no State action having been instituted. A Three Judge Court was convened to hear the matter, pursuant to Title 28 U.S.C. Sections 2281 and 2284. The matter was submitted and argued to the Court upon an agreed Statement of Facts consistent with the foregoing statement.

We need go no further than *Kramer v. Union Free School Dis-*

and of the political subdivisions thereof affected by such questions."

Title 9, Section 782, A.R.S.: "When the governing body of an incorporated city or town determines to borrow money under the provisions of this article, the question of issuing bonds under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bond shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose as provided in this article."

trict, 395 U.S. 621, 89 S.Ct. 1886, and *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, both decided June 16, 1969.

In *Kramer, supra*, the Supreme Court has held that State Statutory and Constitutional provisions prohibiting the exercise of the voting franchise to some electors, while allowing it to others, must be subjected to close scrutiny to "determine whether the exclusions are necessary to promote a compelling State interest." If there is no compelling State interest to be promoted by the exclusion, the Constitutional and Statutory provisions are violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

As in *Cipriano, supra*, we find the challenged Constitutional provision and the challenged Statutes under which the election was held to contain "a classification which excludes otherwise qualified voters, who are as substantially affected and directly interested in the matters voted upon as those permitted to vote." There was no evidence before this Court which would justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest. Moreover, in the instant case we find no evidence which would justify a distinction between Revenue Bonds and General Obligation Bonds.[2]

In *Cipriano, supra*, in order to avoid significant hardships on cities' bondholders and others, the Court held the rule of that case would be applied prospectively, "only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision.

In the instant case the authorization to issue the securities was

---

[2] The defendants concede that *Kramer* and *Cipriano* require that the election be invalidated insofar as it authorized the issuance of Revenue Bonds.

not legally complete by June 16, 1969, (the date of the *Cipriano* decision) nor had the time expired within which the election could have been contested. In the instant case we find the Arizona Constitutional and Statutory exclusions involved in the election called by the City of Phoenix and held June 10, 1969, to be violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

IT IS ORDERED that the defendants will be permanently enjoined from the issuance of any securities purportedly authorized by the challenged election, and the plaintiff's counsel will submit a proposed form of judgment.

DATED this 17th day of November, 1969.

WALTER ELY
United States Circuit Judge
WALTER E. CRAIG
United States District Judge
WM. P. COPPLE
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI, Plaintiff, vs. CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN F. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, members of and constituting the City Council of the City of Phoenix, Arizona, Defendants.	NO. Civ-69-335-PHX. JUDGMENT

The Plaintiff's Motion for Preliminary Injunction having been scheduled for argument the 31st day of October, 1969, and the parties having stipulated that all merits of the case be submitted for final determination at the date set for oral argument, and the Court being fully advised in the premises and the Court having heretofore entered its OPINION AND ORDER.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Article 7, Section 13, Arizona State Constitution; Article 9, Section 8, Arizona State Constitution; Title 9, Section 523, Arizona Revised Statutes; and Title 35, Section 455, Arizona Revised Statutes; are violative of the 14th Amendment of the United States Constitution insofar as said sections of the Constitution of the State of Arizona and statutes of the State of Arizona restrict elections to real property taxpayers who are qualified electors of the subdivision.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the special election held on June 10, 1969, pursuant to City of Phoenix Ordinance #S-4747, be declared, and the same is declared, to be null and void and have no force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of the above captioned defendants, their successors, agents, or attorneys be and they are permanently enjoined from taking any further action to sell or issue any bonds purportedly authorized by the special bond election held on June 10, 1969.

DATED: This ..... day of December, 1969.

.....
United States Circuit Judge

.....
United States District Judge

.....
United States District Judge

APPROVED AS TO FORM:

ROBERT BACKSTEIN

ALAN K. POLLEY
Assistant City Attorney

APPENDIX C

DORRIS HANDY, JR. VERSUS PARISH SCHOOL BOARD OF THE PARISH OF ACADIA	FIFTEENTH JUDICIAL DISTRICT COURT NUMBER: 31,923 PARISH OF ACADIA, LOUISIANA

REASONS FOR JUDGMENT

This is a suit by a registered voter qualified to vote in the Parish of Acadia who resides in but does not own real or immovable property or other property subject to ad valorem taxation in Crowley School District No. 2 of Acadia Parish, Louisiana, against the Parish School Board of the Parish of Acadia, the governing authority of said school district. Plaintiff seeks to have an election which was held in the School District on April 22, 1969, authorizing the incurring of debt and issuance of $3,125,000.00 of general obligation bonds of said School District, declared null and void, in contravention of the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution, and further seeks to enjoin the defendant from issuing, offering for sale and/or selling the aforesaid bonds, and from enforcing, executing, administering or in any way giving effect to the provisions of the Constitution and Statutes of the State of Louisiana which have the effect of requiring ownership of property and the payment of taxes thereon as a condition of voting in general obligation and elections in the State. Plaintiff further prays that he and all registered voters in Crowley School District No. 2 of Acadia Parish be declared eligible to vote in all general obligation bond elections held in said School District pursuant to the general election laws of the State. Defendant has filed peremptory exceptions of prescription, no right and no cause of action and, reserving its rights under said exceptions, has answered the petition. Prior to the date fixed for the hearing of the preliminary injunction, counsel for plaintiff and defendant entered

into a stipulation that the trial of the preliminary and final injunction be tried and decided at the same time, and further stipulated that the entire matter should be tried on the pleadings and exhibits attached thereto, and be submitted to the Court on briefs of counsel for both parties without oral argument.

The facts as shown in the pleadings and evidence submitted show that on March 3, 1969, the Parish School Board of the Parish of Acadia, the governing authority of Crowley School District No. 2 of Acadia Parish, Louisiana, adopted a resolution calling a special election to be held in said School District to authorize the incurring of debt and issuance of general obligation bonds of said School District to the amount of $3,125,000.00. The election was held as called on April 22, 1969, and the proceedings adopted by the defendant on April 24, 1969, canvassing and promulgating the votes cast at said special election were duly published in a newspaper within the School District as well as in the official journal of said School Board. The date of publication in the newspaper published within the School District was May 9, 1969 and there was full compliance with the provisions of R.S. 39:515. The results of the election indicate that 417 votes representing an assessed valuation of $1,311,156.00 were cast in favor of the proposition and 224 votes representing an assessed valuation of $559,568.00 were cast against said proposition.

The election was called pursuant to the provisions of Article XIV, Section 14(a) of the Louisiana Constitution as well as Part II and Sub-Part A of Part III, Chapter 4, Title 39 of the Louisiana Revised Statutes of 1950. This constitutional provision and the provisions of R.S. 39:508 specifically provide that only property taxpayers qualified as electors under the constitution and laws of this State are entitled to vote in such an election. Plaintiff, being a qualified elector but not a property taxpayer, was not permitted or entitled to vote in said election under the aforesaid constitutional and statutory provisions. In his petition, plaintiff

further avers that the defendant contemplates and intends to call further elections for the issuance of general obligation bonds under these identical constitutional and statutory provisions permitting only property taxpayers qualified as electors to vote, which is admitted by the defendant, and seeks to enjoin defendant from calling any future elections under said authority on the basis that these Louisiana constitutional and statutory provisions discriminate against plaintiff and others similarly situated, depriving them of their rights, privileges and immunites under the Equal Protection Clause to the Fourteenth Amendment of the Constitution of the United States. In attacking the constitutionality of the Louisiana constitutional and statutory provisions, plaintiff relies on several cases of the United States Supreme Court and particularly the recent cases of *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886 (1969); *Cipriano v. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897 (1969); and *Harper v. Virginia Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079 (1966).

In the *Kramer* case the United States Supreme Court voided a New York statute which excluded from the electorate in school district elections certain electors who were otherwise eligible to vote in state and federal elections. Under the New York statute, to be eligible to vote at an annual school district meeting an otherwise qualified (citizenship and age) district resident must have been either (1) the owner or lessee of taxable real property located in the district, (2) the spouse of one who owns or leases qualifying property, or (3) the parent or guardian of a child enrolled for a specified time during the preceding year in a local district school.

The *Cipriano* opinion extended the *Kramer* decision to revenue bond elections. It held that the provisions of Louisiana law which limited to property taxpayers the right to vote in revenue bond elections violated the Equal Protection Clause of the federal constitution. In declaring unconstitutional the Virginia poll tax, the

United States Supreme Court in the *Harper* case declared: "that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."

Relying on these decisions, plaintiff attacks the provisions of the Louisiana constitution and statutes requiring a taxpayers election in general obligation bond elections on the basis that such constitutional and statutory provisions which have the effect of excluding all qualified voters except registered property taxpayers are not exclusions which are necessary to promote a compelling state interest; that the interest of the property taxpayer in general obligation bond elections is no more substantial or greater than the registered voter who does not own real property or other property subject to ad valorem taxation in the State, in that:

(a) In most instances the property owner in the State of Louisiana residing in his property pays no taxes whatsoever or only a small portion thereof in view of the veteran's exemption and homestead exemption afforded such owners of real property and the taxes levied or assessed against such property are in fact paid out of the general revenues of the State of Louisiana, and, consequently, payable by all of the citizens and business enterprises in the State who pay taxes;

(b) The requirement that the proposition be approved by a majority of property taxpayers in number and amount represents a dilution of the weight of a citizen's vote in that the vote of property owners who have a large assessment is more effective and carries a greater weight than those property owners with lesser assessed valuations;

(c) Non-resident property taxpayers and legal entities such as corporations, associations and partnerships who own real property but are not otherwise qualified to vote, pay a substantial or majority share of ad valorem taxes in the Parish, but because of their corporate and partnership status and non-residency qualification cannot participate in the election under any circumstance; and

(d) Registered voters who do not own real property in the School District are substantially interested in and significantly affected by the School Board's decisions. All members of the community have an interest in the quality and structure of public education and decisions submitted to only one class of citizens who own real property may have grave consequences to the entire population. Further, the level of property taxation affects every citizen as property tax levels affect the price of goods and services in the community.

The prayer of plaintiff is several fold: First, plaintiff prays that the election held in the School District on April 22, 1969, be declared null and void, in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; second, that the defendant, all of the members thereof, their agents, servants and employees, be restrained, enjoined and prohibited from issuing, offering for sale and/or selling the bonds authorized at said election; third, that defendant be further enjoined from enforcing, executing, administering or in any manner giving effect to the provisions of the Louisiana constitution and statutes which have the effect of requring ownership of property and the payment of taxes thereon as a condition of voting in general obligation bond elections; and fourth, that petitioner and all registered voters in the School District be entitled to vote in all general obligation bond elections held in said School District under the general election laws of the State of Louisiana.

The peremptory exceptions of defendant rely in part on the provisions of Article XIV, Section 14(n) of the Louisiana Constitution and R.S. 39:518. The answer of defendant substantially admits the factual allegations hereinabove enumerated but denies that the provisions of the Louisiana constitution and statutes which require ownership of property and the payment of taxes as a condition of voting in general obligation bond elections are

repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Contsitution.

In opposition to plaintiff's attack on the election held in Crowley School District No. 2 of Acadia Parish on April 22, 1969, defendant has filed peremptory exceptions of prescription, no right and no cause of action. Defendant cites and relies on Article XIV, Section 14(a) of the Louisiana Constitution and R.S. 39:518, the pertinent language of which specifically recites that no court shall have authority to inquire into the validity of any election or the authority to issue bonds after sixty days have run from the date of promulgation of the election results. The undisputed facts of this case reveal that the election results of the School District election were promulgated and published on May 9, 1969, in accordance with the provisions of R.S. 39:515 requiring the publication in a newspaper published in the subdivision, or if there is none, in a newspaper published in the Parish. Plaintiff's suit was filed more than sixty days after the date of the publication of the promulgation and Article XIV, Section 14(n) of the Louisiana Constitution and R.S. 39:518 operate as a complete extinguishment of the right to attack the election. *Andrieux v. East Baton Rouge Parish School Board, et al,* Docket Number 50,160 of the Supreme Court of Louisiana.

As regards the constitutionality of the provisions of Article XIV, Section 14(a) of the Louisiana Constitution and R.S. 39:508 which limit the franchise in general obligation bond elections to only property taxpayers qualified as electors under the constitution and laws of this State and require that the proposition submitted be carried by a majority in number of votes and assessment voted, this Court is constrained to hold that such provisions are not in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court still recognizes that under certain circumstances a state might limit the exercise of the vot-

ing franchise to those "primarily interested" or "primarily affected." If a state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the statute does not violate the federal constitution if the exclusions are necessary to promote a compelling state interest. This Court is in agreement with the following provisions of Judge Parker's district court decision in the *Andrieux* case:

> "Since the first appearance in Louisiana of constitutional authorization to vote public debt secured by ad valorem taxation, the right to vote has been delegated to property owning qualified electors. Such citizens must vote affirmatively, not only in number of votes cast but in assessed valuation. The assessed valuation is based on the last completed tax roll against which, in the following years, such ad valorem taxes would be computed and allocated. The Constitution of 1921 was drafted and put into effect as authorized by Act 180 of 1920 adopted by the qualified electors of the State at an election held November 2, 1920. A provision similar to the requirement of Article 14, Section 14(a) (qualified taxpaying voters) was contained in the previous Constitution in effect of date 1898.
>
> "In the CIPRIANO case, supra, there was no direct connection as here found between the proposition voted on and the obligation to pay. The franchise here is limited to those qualified voters who are 'specially interested' in the election which can result in the imposition of a tax specially calculated to be paid by such voting classification. The rational basis for the qualification here is that imposition of the tax must be authorized by a vote of the payers of the tax. In determining whether the exclusion here is necessary to promote a compelling State interest, this Court has taken note of the nature of the tax, the manner of the imposition thereof, the procedure for the collection, the right to seize and sell the taxpayer's property in the event of a failure to pay. The obligation to and the consequent liability for non-payment is solely that of the property owner. If for some reason he is unable to pay the tax, he will suffer the penalties imposed by law. His property will be the subject of seizure and tax sale.
>
> "This Court is also aware that Louisiana law requires that 'all property situated within the state . . . shall be subject to

taxation' (except such as is expressly exempted) (L.R.S. 47:1951.) Article 10 provides exemptions for automobiles, household furniture, private libraries, musical instruments, drapes and rugs as well as other movable furnishings in the house. Other movable items of property owned by citizens are not subject to these exemptions. Under L.R.S. 47:1956, each citizen is required to fill out a list of his taxable property including movable property not exempt, make oath to its correctness and return such list to the Parish Assessor. Most qualified electors meeting the residence requirements of Article 8, Section 1 (one year) would have accumulated at least some personal or movable property subject to assessment, taxation and the required filing of the list under the above cited statute.

"It would seem that these decisions of the United States Supreme Court open the door wide as to the validity of a property tax election, for certainly if there is a case where the primary interest of the election is to be taken into account, it would be in a property tax election of the kind here involved."

For the reasons hereinabove cited, this Court does not have authority to inquire into the validity of the election held in Crowley School District No. 2 of Acadia Parish on April 22, 1969, or of the authority of the defendant board to issue the bonds authorized by the election and inasmuch as the provisions of the Louisiana Constitution and statutes which limit the voting franchise in general obligation bond elections do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the plaintiff is not entitled to the injunctive relief which he seeks in these proceedings and there is no necessity for this Court to pass upon whether the general election laws of Louisiana would apply if it is finally determined that the general obligation bond election provisions of Louisiana are unconstitutional.

Costs of these proceedings are to be paid by plaintiff. An appropriate judgment will be signed upon presentation. Lafayette, Louisiana, this 19th day of November, 1969.

LUCIEN P. BIRTIONAL, JR.
District Judge

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

WAIVER OF RIGHT TO FILE A MOTION TO AFFIRM OR DISMISS IN RELATION TO THE JURISDICTIONAL STATEMENT

Appellee waives her right to file a Motion to Affirm or Dismiss in relation to the Jurisdictional Statement filed by Appellants

in this case for the reason that Appellee believes that a substantial federal question exists and Appellee wishes a determination of the question by this Court.

Respectfully submitted,

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Phoenix, Arizona 85004

By Fred H. Rosenfeld
Fred W. Rosenfeld
Jane Rex Greer

IVAN ROBINETTE
711 Arizona Bank Building
Phoenix, Arizona 85003

Attorneys for Appellee

MEMORANDUM
IN SUPPORT OF APPELLEE'S POSITION

Some explanation of Appellee's unorthodox position appears necessary. Appellee believes that this Court's decision to take jurisdiction of the Cipriano* case precludes a good faith objection to the jurisdiction in regard to the instant action. Borrowing through the vehicle of General Obligation Bonds is the true backbone of municipal financing in the United States. The taking of jurisdiction by the Court in Cipriano, relating to the more limited form of financing (Revenue Bonds), seems to us to imply that the same jurisdiction exists in relation to the same question (restricted elections) regarding General Obligation Bonds. Needed school and municipal developments in the states affected by the Cipriano decision will hang in the balance until it is determined whether or not the doctrine applies to General Obligation Bonds. The prize the Appellee seeks is to vote in all bond elections in districts in which she lives. The determination of this point should now be settled by this Court. It most certainly will arise again and again until a definitive statement is made and it appears to Appellee that much litigation could be avoided if the Court were to render a decision on the merits of this case.

This memorandum is not to be construed in any way as a waiver of Appellee's position on the merits of the case. However, as the issues are now narrowed solely to the question of the

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* *Cipriano v. City of Houma*
395 U.S. 701 (1969)
(probable jurisdiction noted 393 U.S. 1061 [1969])

validity of the City's General Obligation Bonds, Appellee will agree with Appellant that the period for filing briefs may be shortened with the hope that the Court could reach a decision this term.

Respectfully submitted,

GUST, ROSENFELD & DIVELBESS
300 Security Building
Phoenix, Arizona 85004

By Fred H. Rosenfeld
Fred W. Rosenfeld
Jane Rex Greer

IVAN ROBINETTE
711 Arizona Bank Building
Phoenix, Arizona 85003

Attorneys for Appellee

SUPREME COURT, U. S.

JAN 12 1970

JOHN F. DAVIS, CLERK

NO. 1066

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona

Appellants

vs.

EMILY KOLODZIEJSKI,

Appellee

On Appeal From the United States District Court For the District of Arizona

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BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

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NO. ----

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona

Appellants

vs.

EMILY KOLODZIEJSKI,

Appellee

On Appeal From the United States District Court For the District of Arizona

---

BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

THE INTEREST OF THE STATE OF TEXAS

When an election is held by a political subdivision of the State of Texas for the purpose of authorizing the issuance of bonds, the principal and interest of which are payable from funds derived from the levy of local ad valorem taxes, only otherwise qualified voters who own real or personal property which has been duly rendered for taxation within the political subdivision are entitled to vote. If the instant case is affirmed, millions of dollars of general obligation tax bonds issued

by political subdivisions of the State of Texas will be of questionable validity. The State of Texas, therefore, has a material interest in the disposition made of the case presently before the Court.

TEXAS CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Texas, Article 6, Section 3a. Bond issues; loans of credit; expenditures; assumption of debts; qualification of voters.

> Sec. 3a. When an election is held by any county, or any number of counties, or any political subdivision of the State, or any political subdivision of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages, or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political subdivision, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence. Added November 8, 1932.

The constitutional provisions of the State of Arizona and the State of Texas are in all material respects the same except that the Constitution of Arizona apparently restricts the vote to owners of real property, while the Constitution of Texas permits the owners of both real and personal property to vote.[1]

---

[1]The Texas Constitution, Article 6, Section 3a, restricts the franchise in such elections to electors who own taxable property and who have duly rendered the same for taxation. Texas courts have consistently construed this provision to mean either property that has been voluntarily rendered by the

QUESTIONS PRESENTED

1. Whether a State Constitutional provision restricting the vote in elections held to authorize the issuance of general obligation tax bonds to property owners is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the Court, in the event it determines such voting restrictions to be repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, should give such decision prospective application only.

ARGUMENT

POINT 1

When bonds issued by a political subdivision of a State are exclusively paid from funds derived from the levy of ad valorem taxes upon real and personal property, then the owners of property within such political subdivision are specially interested in an election held for the purpose of authorizing the issuance of such bonds and the levy of taxes in payment thereof, and the State, in restricting the right of franchise at such elections to the owners of real and personal property who reside within such political subdivision, is promoting a compelling State interest.

The Constitution of the United States does not establish voting qualifications. This determination is left

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owner or property that has been placed on the unrendered tax rolls by the Tax Assessor. There is no restriction as to the class or value of property that must be owned. There is no requirement that taxes assessed and levied against such property be paid prior to the owner's being permitted to vote.

to the individual states, subject to the equal protection requirements of the Fourteenth Amendment of the Constitution of the United States. This Court has never specifically determined under what circumstances a state may limit the franchise. This Court, however, has recently held that a State cannot grant the right to vote to bona fide residents of requisite age and citizenship and deny the franchise to other such citizens unless the exclusions are necessary to promote a compeling State interest. *Kramer v. Union Free School District,* 395 U.S. 621, 23 L. Ed. 2d 583, 89 S.Ct. 1886. This Court in *Kramer* did not specifically define the term "compelling State interest" and refused to express an opinion as to whether a State in some circumstances may limit exercise of the franchise to those "primarily interested" or "primarily affected." The Court, however, did indicate that such classifications, while they would be closely scrutinized by the Court would be constitutional if tailored in such manner that the exclusion of a specific class of voters is necessary to achieve an articulated State goal. *Kramer v. Union Free School District,* 395 U.S. 621 at page 632. The requirements of constitutionality, as outlined in *Kramer,* are two-fold: First, Is there a compelling State interest sufficient to justify limiting the franchise in an election to members of a specific class; Second: Does the State statute (or constitutional provision) as written substantially tailor the classification of voters so as to permit inclusion of all persons who have a direct interest in the subject election and so as not to exclude others who may have a similar interest.

The Court in *Kramer,* while refusing to express an opinion as to the first standard, held that the New

York Statute before the Court was not sufficiently tailored to limit the franchise to those persons "primarily interested" in school affairs so as to justify denying the franchise to the appellant and members of his class.

This Court (during the same term it decided *Kramer,* supra) handed down its decision in *Cipriano v. Houma,* 395 U.S. 701, 23 L.Ed. 2d 647, 89 S.Ct. 1897. The Court in *Cipriano,* as in *Kramer,* refused to determine whether a State might in some circumstances constitutionally limit the franchise to qualified voters who are also "specially interested" in the election but as in *Kramer* held that the challenged statute contained a classification that excluded otherwise qualified voters who were as substantially affected by and interested in the matters voted upon as were those who were permitted to vote.[2]

This Court has, as noted above, never held that a State cannot constitutionally limit the franchise to a certain class or classes of qualified voters who are also "specially interested" in the subject matter of a special election. This amicus curiae submits that a State can, in an election held by a political subdivision for the purpose of authorizing the issuance of general obligation tax bonds and the levy of taxes in payment thereof, limit the franchise at such elections to voters who reside within such political subdivision and who own taxable property which has been duly rendered for taxation. Texas, Arizona, and thirteen other

[2]In this case (as in *Kramer* and *Cipriano*), there is no challenge as to other voter qualifications such as age, residence or registration. The sole issue is the constitutionality of restricting the franchise to property owners in elections held to authorize the issuance of general obligation tax bonds.

states have constitutional limitations to such effect. The limitation as to Texas cities and incorporated towns was first set forth in the Constitution adopted February 15, 1876. The several Constitutions adopted prior to the Texas Constitutional Convention of 1875, contained no restrictions of the franchise based upon the ownership of the property. At the Constitutional Convention of 1875, however, it was recognized that property owners were the people who would be solely responsible for the payment of most bonded debt and they alone should be priviliged to say if such debt was necessary or desirable. The Constitution submitted by such convention and adopted by the entire electorate February 15, 1876, limited the franchise at elections held in any city or incorporated town, to determine the expenditure of money or assumption of debt, to persons who paid taxes on property within such city or incorporated town. The disfranchisement of non-property owners on questions of local finances was extended from cities and incorporated towns to all political subdivisions of the State by the adoption of Section 3a of Article 6 of the Constitution of Texas by the voters (including non-property owner voters) of the state in 1932. At the present time, therefore, in all elections held by political subdivisions of the State of Texas to authorize the issuance of bonds payable from the levy of ad valorem taxes, the franchise is limited to otherwise qualified voters who own property in the political subdivision holding the election. The rationale of such limitations is that general obligation tax bonds will be payable from taxes levied against the owners of property within such political subdivisions and that since the owners of property within such political subdivisions will be solely responsible for the

payment of interest upon and the principal of such bonds they have a "special interest" in determining whether such bonds should be issued. This is particularly true where a state constitution contains no limitation as to the rate of ad valorem taxes that may be levied for the payment of local debts in certain political subdivisions. It was feared that voters who did not own property would have no hesitation in approving local indebtedness to the extent that it would require the levy of prohibitive and confiscatory local ad valorem taxes to amortize the indebtedness so created.

This Court in the *Cipriano* case, supra, held that the owners of taxable property did not have a "special interest" in elections held for the purpose of authorizing the issuance of revenue bonds. The Court in *Cipriano* distinguished revenue bonds from general obligation tax bonds by noting that payment of revenue bonds was made from revenues derived from the utility services and such bonds are not financed in any way by property taxes. The Court stated: "Property owners like non-property owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on the property owner and non-property owner alike." When a Texas political subdivision issues a general obligation tax bond, however, the distinctions noted in the *Cipriano* case do not apply. In the latter instance, funds for the payment of such bonds are derived entirely from the levy of ad valorem taxes on real and personal property. The property owners accordingly have a special interest in the outcome of the election because of the debt cre-

ated that will be payable by them and which is secured by a lien against their property.[3] This amicus curiae, therefore, respectfully submits that a State by restricting the franchise in elections held for the purpose of

[3]There are instances where municipal subdivisions are authorized to issue bonds payable from both revenues and ad valorem taxes. This is a common practice with utility districts. For example, Water Control and Improvement Districts organized under the provisions of Section 59, Article 16, Constitution of Texas, and Article 7880, Vernon's Revised Civil Statutes, can issue bonds payable solely from revenues, payable solely from the levy of ad valorem taxes, or payable both from revenues and the levy of ad valorem taxes. Voters who reside within such districts and are otherwise qualified to vote but who do not own taxable property are authorized to vote for the directors of the district. The directors in turn are responsible for establishing utility rates. Such voters are interested in elections held to authorize the issuance of revenue bonds. They, of course, are protected from the establishment of unreasonable utility rates since they are authorized to vote for the directors. When, however, bonds are issued payable solely from ad valorem taxes only property owners can vote. In such instances, revenues cannot be used for payment of the bonds and the qualified voters who own taxable property clearly have a special interest in the outcome of the election. A more difficult question will arise in an election held to authorize the issuance of bonds payable both from revenues and ad valorem taxes. In such elections both classes of voters can effectively control the establishment of reasonable utility rates by electing the directors who set the rates since there is no limitation of the franchise at such elections. However, in elections held to authorize the issuance of bonds payable both from revenues and the levy of ad valorem taxes, the franchise is limited to voters who own taxable property. It can easily be seen if this were not the case that in districts where the preponderance of voters do not own taxable property, there will be a natural tendency to authorize the issuance of bonds payable both from revenues and ad valorem taxes, and, since non-property owners constitute a preponderance of the voters, to elect directors who will keep revenues at a minimum and cast the principal burden for the payment of bonds upon property owners. Thus, in elections held to authorize the issuance of combination revenue and ad valorem tax bonds the owners of taxable property still have a special interest in the election which justifies the restriction of the franchise to voters of such class.

authorizing the issuance of general obligation tax bonds to qualified voters who own taxable property is promoting a compelling state interest, and that such classification of voters is tailored so as to permit the inclusion of all persons who are directly interested in the outcome of such elections.

The compelling interest of the State of Texas in its constitutional classification of voters in general obligation tax bonds elections, is the State's natural and manifest concern for the financial stability and continuity of its political subdivisions. To permit those to vote who show no willingness to share the burden of taxation levied for the sole purpose of retiring debt is opening wide the door of unfair and confiscatory taxation.

The voter classification of Article 6, Section 3a of the Texas Constitution does not in truth exclude any otherwise qualified elector who really wants to vote in an election "For issuing bonds or otherwise lending credit or expending money or assuming any debt." All that is required for qualification to vote is the rendition of any property of any kind, regardless of value, for taxation. Under the constitutional language, an elector may render any item of personal or household property and though the tax he might pay on such property would be nominal, he would by such rendition be entitled to vote. It is inconceivable that there is any otherwise qualified elector who under this definition, could be considered "non-property owning."

One of the primary historical purposes of the Constitutional provision in question, was to encourage the rendition of property for taxation and the resultant

participation by otherwise qualified electors in the financing of public improvements.

The classification in question hinges on the phrase "who have duly rendered," and therefore excludes not only non-property owners, (not conceding that such a group exists under the constitutional definition), but likewise property owners who have not rendered property for taxation, those who are non-residents, and corporate property owners.

The classification is tailored to fit rational requirements for any kind of voting as well as limiting the franchise to those resident property owners whose property will be solely liable for the tax levied to retire debt. Clearly, this class of electors has a "special interest" in any election wherein the decision involves the assumption of debt and resultant tax levy within its own community.

The allegation of appellee in paragraph VIII of her First Amended Complaint is, that by payment of rent for use of real property, she is indirectly responsible for the payment of ad valorem taxes levied against such property.

This premise fails to take into account the transitory nature of the occupation of rental property by tenants as opposed to the irrevocable nature of the lien created by bonded indebtedness against such property. Tenants are free to vacate at will or upon the termination of their leases. The property owner is liable for the tax until the debt is paid no matter if the property is rented or vacant.

Appellee's position likewise fails to take into account the vast amount of real property which is owner

occupied. She apparently believes her interest in the assumption of debt and the levy of taxes against property to pay it, is equal to all this class of property owners. The fallacy of this logic should be manifest.

Paragraphs VI through X of the Stipulated Statement of Facts filed in the trial court indicate that she does in fact pay excise taxes, a portion of which are devoted to the retirement of bonded debt. There is clear distinction here between the requirements of the Arizona and Texas laws. In Texas only those property owners whose realty and/or personalty has been duly rendered and thereby placed upon the tax rolls, either by the responsible taxing entity or by the voluntary act of the property owner, are responsible for the payment of taxes dedicated to the retirement of bonded debt. Otherwise qualified electors in Texas who have no property rendered and on the tax rolls, are absolutely and totally free of the burden of ad valorem taxes pledged to the payment of debt.

POINT 2

Assuming arguendo that the Court holds state constitutional provisions limiting the franchise in general obligation tax bond elections to property owners to be in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, the Court should give such decision prospective application only, so that general obligation bonds previously authorized or issued pursuant to such elections will not be invalidated.

Nearly all locally financed improvements are constructed with funds obtained from the issuance and sale of municipal bonds. A great percentage of the bonds

so issued are general obligation tax bonds because municipalities can, by securing payment of their bonds through a pledge of their taxing power, obtain a lower net effective interest rate on funds so borrowed. If this decision is affirmed and given retroactive application to the date of *Cipriano,* millions of dollars of bonds previously issued by Texas municipalities and in the hands of banks, insurance companies, and other institutions, as well as individuals, will be invalidated.[4]

This problem was recognized by the Court when it decided *Cipriano v. Houma, supra.* The Court in the *Cipriano* case realized the injustice that would be occasioned by giving its decision retroactive application insofar as revenue bonds were concerned. In refusing to give its decision retroactive application, the Court stated at page 706:

> "Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. * * * (Citation of authorities omitted) * * * Therefore, we will apply our decision in this case prospectively."

The Court then held in applying the *Cipriano* decision prospectively that it would not invalidate revenue bonds previously authorized by an election of the type determined to be invalid in *Cipriano* when, under state law, time for challenging the election results had expired prior to the date *Cipriano* was

[4] (See Exhibit "A" for those issues which would be affected).

decided. A cutoff period was, therefore, provided and where the authorization to issue bonds was legally complete on the date of the Court's decision, the bonds could still be issued and sold. Of course, bonds issued and sold prior to the opinion would be valid and would not be invalidated by *Cipriano*. The District Court of Arizona in the case presently being considered, apparently holds that in instances where the authorization to issue tax bonds was not legally complete on the date of the *Cipriano* decision, such bond would be invalid. If this Court feels that the case should be affirmed, then that portion of the opinion of the District Court indicating that the cutoff should be made retroactive to the date of the *Cipriano* decision, should be modified. If this is not done, municipalities that have issued bonds subsequent to the cutoff established by the *Cipriano* decision will suffer irreparable harm. For example: Not only will their credit rating be greatly harmed in the future for having issued void bonds in the past, but it can be reasonably expected that a multiplicity of law suits will arise by the holders of the void bonds to recover unspent bond moneys and/or to enjoin futher expenditures of such funds on uncompleted public works in progress. Thus, where a school district has issued its general obligation bonds which would be void by failure of this Court to decide this case prospectively, an injunction to prevent the District from spending unspent bond moneys to complete the schoolhouse would deny the advantages to be obtained from a completed facility, a result which would be cataclysmic to all parties involved notwithstanding that all acted in good faith. No doubt, much other litigation would arise under some theories of law on the part of holders of the void bonds to recover

money that they had lent the municipalities in good faith, which had been done to a great extent relying upon the opinion of the Attorney General of this State as well as other recognized bond attorneys, that the bonds constituted valid and binding obligations. Surely had this Court stated in *Cipriano* as a guide line that such holding would also apply to general obligation tax bonds, no such bonds would have been thereafter approved by the Attorney General of this State. But an adverse decision in Kolodziejski applied retroactively to *Cipriano* would work undue hardship on the investors of such general obligation bonds.

Political subdivisions of those states that restrict the franchise in elections held to authorize the issuance of general obligation tax bonds to property owners were faced with a paradox as a result of the *Cipriano* decision. This Court in the *Cipriano* decision refused to specifically hold whether a state can or cannot constitutionally classify voters. The opinion, however, did imply that such classification might be valid if restricted to elections held to authorize the levy of ad valorem taxes.* In construing the *Cipriano* decision, the attorneys representing Texas municipalities desiring to issue bonds were faced with a situation where bonds would not be approved by the state's Attorney General

*The principal basis for the Court holding the classification of voters in *Cipriano* to be invalid was the fact that revenue bonds were not financed by property tax revenue. The Court stated: "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bonds issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike."

if voters other than property owners were allowed to vote while, on the other hand, they faced the problem that such bonds might subsequently be held invalid if at such elections voters who were otherwise qualified but did not own property were excluded.*

This is particularly true in instances where this Court handed down its decision in *Cipriano* subsequent to the date elections were held to authorize the issuance of bonds but prior to the expiration of the time for challenging the election results according to state law.

CONCLUSION

In order to obtain funds necessary to construct needed improvements, political subdivisions have found it advisable to issue general obligation tax bonds. Investors, relying on the security offered by municipal investments, have purchased and now hold millions of dollars of such bonds. If the opinion of the United States District Court, District of Arizona, in the case presently being considered is affirmed without modification, outstanding tax bonds totalling millions of dollars, issued since the Court's decision in the *Cipriano* case, will be invalid. It is, therefore, imperative that this Court note probable jurisdiction and set this case on the docket for hearing on its merits.

The overwhelming majority of municipal bonds issued by political subdivisions are general obligation tax bonds. Since such bonds are in some instances paid

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*A letter mailed by the Attorney General of Texas to all recognized bond attorneys in Texas, dated July 10, 1969, explaining the position to be taken by the Attorney General's office relative to the *Cipriano* decision is attached as Exhibit "B" to this brief.

entirely from the levy of taxes, and in most instances paid principally from the levy of taxes, property owners have a special interest in the outcome of elections held to authorize the issuance of tax bonds and the levy of taxes in payment thereof. There exists, therefore, a compelling state interest sufficient to justify the restriction of the franchise in such elections to the owners of property within the political subdivisions issuing the bonds. Otherwise, the owners of such property will face the possibility of being subject to the imposition of an unreasonable and prohibitive tax without adequate representation as a voting class. Constitutional or statutory limitations restricting voting in such elecions to property owners are not an arbitrary or irrational classification, but are tailored in a manner necessary to achieve an articulated state goal. Furthermore, this amicus curiae submits that in view of the fact that this Court expressly refrained from indicating that the general obligation bonds were within the scope of the *Cipriano* decision; that those having the responsibility of issuing and approving general obligation bonds could reasonably presume that any future decision of this Court which might apply the *Cipriano* ruling to bonds of this type would be given prospective effect only. Should this Court affirm this case and not give the ruling prospective effect only, it is genuinely feared that municipal bond markets will face chaotic conditions, particularly in view of the present state of such markets, with the resulting impairment of the credit of many municipalities and heavy losses to investors.

Respectfully submitted,

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By Nola White

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EXHIBIT "A"

TEXAS TAX BOND ISSUES WHICH WOULD BE ADVERSELY AFFECTED BY AFFIRMATION OF THE OPINION-ORDER IN THIS CASE

Saltillo Rural High School District School Building, Bond Series 1969	$ 35,000.00
Ennis I.S.D. School Building Bonds, Series 1969	$ 390,000.00
Grapevine I.S.D. School Building Bonds, Series 1969	$ 2,025,000.00
Rains I.S.D. School Building Bonds, Series 1969	$ 225,000.00
City of Caldwell, Texas General Obligation, Street Improvement Bonds, Series 1969	$ 150,000.00
Ponder I.S.D. School Building Bonds, Series 1969	$ 53,000.00
Road Bonds of Road District No. 2 of Sherman County, Texas	$ 110,000.00
Little Elm Rural High School District School Building Bonds, Series 1969	$ 200,000.00
Ridgemont Municipal Utility District Water and Sewer System Combination Unlimited Tax and Revenue Bonds, Series 1969-A	$ 970,000.00

Ridgemont Municipal Utility District Water and Sewer System Combination Unlimited Tax and Revenue Bonds, Series 1969-B	$ 230,000.00
Edgewood I.S.D. Schoolhouse Unlimited Tax Bonds, Series 1969	$ 1,000,000.00
Tarkington I.S.D. Schoolhouse Bonds, Series 1969	$ 425,000.00
Hondo I.S.D. School Building Bonds	$ 1,200,000.00
River Plantation Municipal Utility District—re-voting interest rate on bonds approved by vote of 9-18-65	$ 1,350,000.00
Bowie County Common School District No. 42 Bonds, Series 1969	$ 50,000.00
City of Silverton, Texas General Obligation Bonds, Series 1969	$ 25,000.00
Premont I.S.D. School Building Bonds, Series 1969	$ 1,850,000.00
Timpson I.S.D. School Building Bonds, Series 1969	$ 150,000.00
City of Yorktown, Street Improvement, General Obligation Bonds, Series 1969	$ 100,000.00

City of Dalworthington Gardens, General Obligation Sewer System Bonds, Series 1968	$ 165,000.00
Belton I.S.D. School Building Bonds, Series 1969	$ 450,000.00
A&M Consolidated I.S.D. Schoolhouse Bonds, Series 1969	$ 1,000,000.00
City of Rockport, Texas General Obligation Bonds Series 1969	$ 400,000.00
Deaf Smith County Hospital Bonds, Series 1969	$ 500,000.00
City of Mineral Wells General Obligation Street Improvement Bonds, Series 1969	$ 1,500,000.00
Harris County Flood Control District Bonds, Series 1969-A	$ 4,000,000.00
TOTAL	$18,553,000.00

EXHIBIT "B"

THE ATTORNEY GENERAL OF TEXAS
Austin, Texas 78711
July 10, 1969

Gentlemen:

In view of the uncertainty that has arisen since the decision of the United States Supreme Court in *Kramer v. Union School District 15* and *Cipriano v. City of Houma et al.*, we thought that a statement of policy from this office would be in order.

It is the duty of the Attorney General to uphold the Constitution and Statutes of the State of Texas until and unless they have been declared invalid by a court of competent jurisdiction. Should a statute or requirement of another State be declared unconstitutional by the United States Supreme Court on basic constitutional principles, the Attorney General of Texas will recognize that a like statute of this state is unconstitutional and may be disregarded, but only to the extent and in the circumstances, in which the like statute has been held to be unconstitutional.

Applying the above rationale to the approval of bonds, we will pursue the following course:

1. In bond issues to be funded solely by revenue *Cipriano* will be applied and the election call should specify that all qualified voters in the District may vote.

2. In relation to bond issues supported by a tax or supported in part by tax and in part by revenue, the United States Supreme Court has not yet declared that laws limiting voting in these elections

to persons who have rendered property for tax is unconstitutional. This office will therefore require that the record reflect that the election call limited the right of franchise to those who have rendered property for taxation in accordance with the existing Constitution and laws of the State of Texas.

Very truly yours,

CRAWFORD C. MARTIN
Attorney General of Texas

CCM:km

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CERTIFICATE OF SERVICE

I, Nola White, First Assistant Attorney General of Texas, certify that a copy of the foregoing Amicus Curiae Brief of the State of Texas in Support of Jurisdictional Statement was served on the attorney for the Appellant, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Rex E. Lee, 111 W. Monroe, Phoenix, Arizona 85003, and the same was served on the attorney for the Appellee in the same manner, addressed to Mr. Fred

H. Rosenfeld, Security Building, Phoenix, Arizona 85004, on this the 9 day of January, 1970.

Nola White

NOLA WHITE
First Assistant Attorney General

SUPREME COURT, U. S.

JAN 12 1970

JOHN F. DAVIS, CLERK

No. 1066

In the

Supreme Court of the United States

OCTOBER TERM, 1969

CITY OF PHOENIX, ARIZONA, et al.,

Appellant,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE CITY OF TULSA, OKLAHOMA, AS AMICUS CURIAE

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BRIEF FOR THE CITY OF TULSA, OKLAHOMA, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of the City of Tulsa, a political subdivision of the State of Oklahoma, and is sponsored by the City Attorney of said city, the authorized law officer thereof under Rule 42(4) of the Rules of the Supreme Court of the United States. The nature of the city's interest is that on September 9, 1969, an election was held in said city at which only taxpayers were permitted to vote on questions of authorizing certain bond issues of said city, including $28,100,000 bonds for the purpose of acquir-

ing and constructing extensions and improvements to the waterworks and water supply system of the city, and $16,900,000 bonds for the purpose of constructing and equipping sewage disposal and treatment plants for sanitary sewer purposes, both of which propositions carried, and also $5,500,000 bonds for storm sewer purposes, $9,200,000 bonds for public park and recreation purposes, $1,125,000 bonds for airport purposes, $2,187,000 bonds for museum purposes, $2,400,000 bonds for fire department purposes, $932,000 bonds for public transportation purposes, $285,000 bonds for assembly center purposes, $7,300,000 bonds for municipal theater purposes, $98,000 bonds for city garage purposes, $16,300,000 bonds for an Arkansas River Lakes Public Park Project, and $289,000 bonds for public safety facilities, which last eleven named issues failed to carry. Such an election is required by the Constitution of the State of Oklahoma, (Article 10, Section 27, of said Constitution) to be limited to property taxpaying voters. All of said bonds would be full general obligation bonds of the city, payable from ad valorem property taxes. In view of *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) and *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, decided by this court on June 16, 1969, said bonds cannot be sold because of the fear of prospective purchasers that such bonds will be held void if issued in reliance upon said election, on the ground that it was held in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The city is not able, however, to resubmit the question of the issuance of such bonds to another election at which all qualified electors may vote because of said state constitutional provision and because there is no law in the State of Oklahoma which authorizes any such election.

The city does not take any position as to the merits of the case, but urges that a decision be made promptly because, until such a decision is made, the water and sanitary sewer projects to be financed by the above described bonds, which are essential to the health and welfare of the inhabitants of the City of Tulsa, cannot be started nor can a new election be held whereat all qualified electors may vote on said bonds.

The city believes that the facts and questions of law pertaining to bond issues of cities in Oklahoma cannot be adequately presented by the parties because said parties are involved with questions of Arizona law alone.

STATEMENT

The City of Tulsa, Oklahoma, as *amicus curiae,* adopts the statement of the case appearing in the Statement as to Jurisdiction of the City of Phoenix, Arizona, the Appellant.

SUMMARY OF ARGUMENT

Because of the great public importance of the ability of the City of Tulsa, and all other political subdivisions in states where the constitution or statutes permit only taxpayers or property owners to vote in general obligation bond elections, to proceed with the financing of essential capital improvements, which cannot now be made because of uncertainty as to the application of the principle established by this court in *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, and *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, a prompt decision of this court is respectfully requested. *Amicus curiae* does not take any position as to whether the decision of the trial court should be affirmed or reversed.

ARGUMENT

The City of Tulsa is now unable to sell $45,000,000 bonds voted for water and sanitary sewerage purposes, because, pursuant to Article X, Section 27 of the Constitution of the State of Oklahoma, said bonds were voted at an election at which only qualified property taxpaying voters were permitted to vote.[1] Said bonds are general obligation

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[1] Most bonds of political subdivisions in Oklahoma are voted under Article X Section 26 or Section 27. The former imposes a debt limit, and permits the issuance of bonds only upon favorable vote of three-fifths of the voters (not just taxpaying voters) voting at an election; the latter permits cities and towns to issue bonds for "public utilities. . . . owned exclusively by such city" without a debt limit upon a favorable vote of a simple majority of the qualified property taxpaying voters. The Oklahoma Supreme Court has held that "public utility" means any public purpose, and that for all purposes except those, such as streets, which are not owned exclusively by the city, bonds should be voted under Section 27. *City of Shawnee* v. *Williamson*, 338 P. 2d 355. Said state constitutional provisions read as follows:

> § 26. Indebtedness of political subdivisions—Assent of voters—Limitation of amount—Annual tax.—Except as herein otherwise provided, no county, city, town, township, school district, or other political corporation, or subdivision of the State, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five per centum (5%) of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring

bonds to which the full faith and credit of the City of Tulsa are pledged, and are expressly excluded from the application of the decision of the Supreme Court of the United States in *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 which held that the provisions of Louisiana law restricting to taxpayers the right to vote in revenue bond elections violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. However, because the reasoning in the *Cipriano* case and *Kramer* v. *Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, may be held to preclude states from restricting to property owners or taxpayers the right to vote in a general obligation bond election, prospective purchasers of the bonds are not satisfied that, if they should purchase bonds voted at such elections, the bonds will be valid and legally binding upon the City of Tulsa.

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[1] (Continued)

of such indebtedness: Provided, that if a school district has an absolute need therefor, such district may, with the assent of three-fifths of the voters thereof voting at an election to be held for that purpose, incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five per centum (5%) but not exceeding ten per centum (10%) of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring of such indebtedness, for the purpose of acquiring or improving school sites, constructing, repairing, remodeling or equipping buildings, or acquiring school furniture, fixtures or equipment; and such assent to such indebtedness shall be deemed to be a sufficient showing of such absolute need, unless otherwise provided by law. Provided, further, that any county, city, town, school district, or other political corporation, or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an

Petitioner is not able to resubmit the propositions for the issuance of the bonds which carried or the bonds which failed to carry to all qualified electors of the city because there is no law which authorizes any such "free-for-all" elections on bond issues of the types here involved, the Constitution of the State of Oklahoma specifically providing that only taxpayers may vote at such an election. The Supreme Court of the State of Oklahoma may later decide whether a determination that the equal protection clause

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[1] (Continued)

annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five (25) years from the time of contracting the same, and provided further that nothing in this Section shall prevent any school district from contracting with certificated personnel for periods extending one (1) year beyond the current fiscal year, under such conditions and limitations as shall be prescribed by law.

§ 27. Indebtedness for purchase, construction or repair of public utilities.—Any incorporated city or town in this State may, by a majority of the qualified property tax paying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section twenty-six, for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city: Provided, That any such city or town incurring any such indebtedness requiring the assent of the voters as aforesaid, shall have the power to provide for, and, before or at the time of incurring such indebtedness, shall provide for the collection of an annual tax in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same.

prohibits taxpayer elections for general obligation bonds results in erasing instanter from the state constitution and laws all provisions which restrict to taxpayers the right to vote in such bond elections, leaving untouched the rest of the legal machinery under which bonds can be voted and issued. However, the Oklahoma Supreme Court cannot render any such decision until a final determination is made of the United States constitutional question. Likewise, the Legislature, if called into special session by the governor, cannot determine what, if any, laws it must adopt to provide for the holding of elections on such bonds until such a final United States Constitutional determination is made; if Article X Section 27 of the Oklahoma Constitution is valid, a law authorizing "free-for-all" elections on bonds covered thereby would be futile.

There are now pending in the state Supreme Courts of Arizona,[2] Idaho,[3] Louisiana,[4] Michigan,[5] and Oklahoma[6]

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[2] *School District No. 26 (Bouse Elementary) of Yuma County, Arizona* v. *Strohm et al.* decided originally in Superior Court in and for Yuma County. Trial court dismissed petition for alternative writ of mandamus to compel Board of Supervisors to order sale of general obligation school bonds voted both (1) at taxpayer's election in accordance with Arizona law and (2) at election held on same day in which all qualified electors were permitted to vote on grounds that (1) violated Federal constitution and (2) was not authorized by Arizona law.

[3] *Muench and Taylor* v. *Paine et al,* Supreme Court of Idaho, Number 10522, alternative writ of prohibition granted September 13, 1969, in original proceeding to prevent Board of County Commissioners from issuing general obligation bonds voted May 27 by taxpayers of school district. Defendants required to show cause on or before October 7 and hearing to be set later.

Bogert v. *Kinzer,* #10446, Supreme Court of Idaho, argued September 11, 1969. Originally suit re constitutionality of requirement for ⅔ vote—attention of court drawn to *Cipriano* case.

cases in which the respective courts are being asked to decide on the constitutionality of their respective state constitutional or statutory provisions which restrict to taxpayers the right to vote in general obligation bond elections. There are also numerous cases pending in various

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[4] *Strick Chambers* v. *Road District No. 505 of Tangipahoa Parish, Louisiana, et al.* #36,478 Appeal from 21st Judicial District Court, Parish of Tangipahoa, which held that plaintiff could not obtain injunction against issuance of general obligation bonds voted at taxpayers' election held on July 7, 1969 because suit was not brought within 60 day period prescribed by Article XIV Section 14(n) of Louisiana Constitution. Affirmed by Louisiana Supreme Court December 15, 1969. Rehearing period expires December 29.

[5] *Detroit Edison Co. et al.* v. *East China Township School District.* Rehearing of case involving annexation of school district and assumption of indebtedness pursuant to election held several years ago at which only taxpayers were permitted to vote.

[6] *Tom Settle* v. *Board of County Commissioners of Muskogee County, Oklahoma,* Number 43812, original action in Supreme Court of Oklahoma to enjoin issue of limited tax industrial development bonds under Article X, Section 35 of Oklahoma Constitution.

Tom Settle v. *City of Muskogee,* Number 43842, original action to enjoin issuance of general obligation bonds voted under Article X, Section 27 of the Oklahoma Constitution at election held on May 6, 1969.

On December 23, 1969, the Oklahoma Supreme Court refused to enjoin the issuance of the bonds at issue in the aforementioned two cases. The rehearing period expires January 2, 1970.

lower federal and state courts.[7] Without prompt guidance from this court, those state supreme courts and other federal courts may or may not reach the same result as this court will reach, or the same result that some of the other courts will reach. If a prompt decision is not made by this court, one or more state supreme courts or lower federal courts may hand down decisions, whether upholding or voiding the state constitutional requirement, in reliance upon which bonds issued by political subdivisions in the state involved will be purchased by investors. If two or more state supreme courts or lower federal courts should reach different conclusions, if bonds of political subdivisions of one state should be issued, having been authorized at "free-for-all" elections in reliance on such a court decision that all qualified electors must be allowed to vote, and if bonds of political subdivisions of another

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[7] *Hobbs* v. *Police Jury of Morehouse Parish* Civ. #14,836, U.S. Dist. Court, W. Dist. of Louisiana, Monroe Division—petition filed July 24, 1969, for three judge court and declaratory relief re general law and particular taxpayers' general obligation bond election, held June 24, 1969, injunction and other relief.

Frank T. Stewart et al. v. *The Parish School Board of the Parish of St. Charles et al.* Civ. #69-2818, U.S. Dist. Court, E. Dist. of Louisiana, New Orleans Division—petition filed November 21, 1969 for three judge court and declaratory relief re general law and particular taxpayers' general obligation bond elections held September 23, 1969, injunction and other relief.

Slette v. *White Pine S.D. Bond Election Judges et al.* #10160 2nd Judicial District Court, Latah County, Idaho. Memorandum decision September 3, 1969, dismissing complaint. Holds bond elections cannot legally be held in Idaho.

Handy v. *Parish School Board of Parish of Acadia,* Fifteenth Judicial District Court of Louisiana, No. 31, 923, filed October 2, 1969—non-taxpayer's petition to enjoin issuance of general obligation bonds and for declaratory and other relief. Bonds were voted at taxpayers' election April 22, 1969, and sixty day contest period started running May 9, 1969. Decision for defendant on November 19, 1969 in trial court.

state should be issued, having been voted at taxpayers' elections in reliance upon a decision of the supreme court of that state or of a lower federal court upholding such elections, then any decision which this court could render on the question might necessarily result in one set of bonds being held illegal and void, even though in the hands of innocent investors and bona fide purchasers.

The test of the validity of a restriction on the right to vote established by the Supreme Court of the United States is as follows, citing from the *Kramer* case: ". . . if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest." This was made applicable to revenue bond elections only by the *Cipriano* case.

' (Continued)

Rankin v. *E. Bat. Rouge Parish School Board*, Dismissed by trial court September 15, 1969—now on appeal in First Circuit Court of Appeal. Same bonds covered in—

Andrieux v. *Parish School Board of East Baton Rouge*, #50160 where Louisiana Supreme Court held on October 23, 1969 that general obligation bonds voted by taxpayers only on February 25, 1969, cannot be contested because contest period expired before June 16, 1969, and before commencement of this suit.

Carter v. *Fort Worth Ind. S.D. & City of Fort Worth* #57283-C Dist. Ct. of Tarrant County, Texas, 67th Dist. Petition filed for declaratory relief re general law.

Anderson v. *Ogden City et al.* in the District Court of Weber County, Utah Civil No. 50717. Suit to enjoin holding taxpayers' election on revenue bonds called for February 17, 1970 and declaratory relief.

Cypert v. *Washington County School District et al.* in the Fifth Judicial District Court in and for Washington County, Utah, Civil No. 4146. Suit to enjoin sale of general obligation school bonds voted at taxpayers' election on May 27, 1969 and declaratory relief.

A decision affirming the trial court could amount to a determination that a constitutional or statutory provision applying to all general obligation bond elections is void if it restricts participation to taxpaying electors. A decision reversing the trial court could give guidance to that court, to other federal district courts and to the courts of the various states where litigation is now pending as to the type of bond elections wherein the franchise may be restricted.

CONCLUSION

The City of Tulsa as *Amicus Curiae* takes no position on the merits of the case but, because of the urgent need to proceed with projects for which bonds were voted by the taxpaying voters of said city, urges that whatever decision is reached be rendered promptly so that said city can soon either sell said bonds or attempt to resubmit the propositions for their issuance to all qualified voters of the city.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel for Amicus Curiae, City of Tulsa, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this 30th day of December 1969

Phillip N. Haller

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, et al,

Appellant,

versus

EMILY KOLODZIEJSKI,

Appellee

On Appeal from the United States District Court for the District of Arizona

BRIEF FOR THE POLICE JURY OF THE PARISH OF TANGIPAHOA, LOUISIANA, THE GOVERNING AUTHORITY OF ROAD DISTRICT NO. 505 OF TANGIPAHOA PARISH, LOUISIANA, AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

May It Please the Court:

The present is the brief of the Police Jury of the Parish of Tangipahoa, Louisiana, acting as the governing authority

of Road District No. 505 of Tangipahoa Parish, Louisiana, as an Amicus Curiae appearing in the above-entitled case under Rule 42, Supreme Court Rules, Title 28, United States Code Annotated, both in support of the jurisdictional statement as well as upon the merits, and is being filed with notice but without the written consent of the parties directly involved in the appeal, as is permitted under paragraph 4 of the said Rule.

Road District No. 505, with the Police Jury as its governing authority, is a political subdivision of the State of Louisiana, under the authority of Article XIV, Sections 14(a)[1]

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[1] **§ 14. Subdivisions of state; creation; indebtedness; bond issues; special taxes**

Section 14. (a). Subdivisions of state listed; indebtedness; bond issues; tax. [As amended by Act 51 of 1926]. Municipal corporations, parishes and school, road, subroad, sewerage, drainage, subdrainage (waterworks and sub-waterworks) districts, hereinafter referred to as subdivisions of the State, may incur debt and issue negotiable bonds, when authorized by a vote of a majority in number and amount, of the property tax-payers qualified to vote under the Constitution and laws of this State, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to retire said bonds at maturity.

(a). [As Amended by Act 261 of 1926]. Municipal corporations, parishes and schools, road, subroad, sewerage, drainage and subdrainage districts, and irrigation districts, hereinafter referred to as subdivisions of the State, may incur debt and issue negotiable bonds, when authorized by vote of a majority in number and amount of the property taxpayers qualified to vote under the Constitution and laws of this State, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to retire said bonds at maturity; provided that the governing authority of any municipality which

and 14(c)[2] of the Louisiana Constitution of 1921, as supplemented by L.R.S. 48:571.[3]

The Police Jury of Tangipahoa Parish, acting as the governing authority of Road District No. 505 of Tangipahoa Parish, Louisiana, held a special bond and tax election to incur debt and to issue bonds in the sum of $80,000, on June 7, 1969. The election carried by a substantial majority both in the number of voters participating as well as in the total amount of assessments involved, and thereafter, on June 10, 1969, these

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has established and is maintaining and supporting public schools of its own shall not be required to impose and collect such tax upon property included within any territory annexed to the municipality for the retirement of bonded indebtedness incurred by the municipality for school purposes prior to the annexation of such territory. (As amended Acts 1964, No. 561, adopted Nov. 3, 1964.)

[2](c). **Road districts, sub-road districts and sewerage districts.** The Legislature may by general law authorize the police juries to create road districts and sub-road districts, composed of territory either wholly within a parish or partly within two or more parishes, and may by general law authorize the police juries to create sewerage districts, composed of territory wholly within a parish, but no sewerage district shall be created comprising the whole territory of a parish; and may by general law authorize municipal corporations to create sewerage districts, whose territory may be less than the territory of the municipality; and may by general law, and within the limitations and conditions herein contained, authorize road districts or sub-road districts so created, through the police jury or juries of the parish or parishes as the governing authority thereof, to incur debt and issue negotiable bonds for the purpose of opening, constructing, improving and maintaining public roads, highways, and bridges in such districts; and may, by general law, and within the limitations and conditions herein contained, authorize sewerage districts, through the governing authority thereof, to incur debt and issue negotiable bonds for the purpose of constructing and maintaining sewers and sewerage disposal works for such districts.

[3] **§ 571. Creation authorized; political subdivision**

Parish governing authorities may create road districts and sub-road districts in the manner and subject to the limitations and restrictions contained in this Part.

Road districts so created are sub-divisions of the state within the meaning of the laws of Louisiana relating to incurring debt and issuing bonds therefor.

results were promulgated by the Police Jury and were published in the official journal of the District on June 19, 1969.

All of the proceedings in reference to the matter were carried out in compliance with Article XIV, Section 14(a) of the Louisiana Constitution,[1] and L.R.S. 39:501, et seq.

The right to participate in this election was restricted under these provisions to qualified taxpaying electors owning real and personal properties.

The petitioner in the Tangipahoa case sought full injunctive relief, against the issuance of the Bonds authorized in said election.

Petitioner in the Tangipahoa case as well as those of his class were shown to be duly qualified electors of the Parish, living within the area of the Road District, but owning no personal or real property subject to the ad valorem tax for debt service on the Bonds. Nevertheless, the contention was made that petitioner and others similarly situated were deprived of the elective franchise in said election solely because of their failure to own any property that would be subject to the taxes, and that plaintiff was thereby discriminated against in favor of persons who owned property who would pay all of the taxes required, and that in this respect they were deprived of rights, privileges and immunities under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In the present Arizona case, the decision by the three-judge court was based on a stipulation of fact strongly indicative of a desire on the part of all litigants to show that there

was no compelling state interest that would justify any distinction under the law of Arizona between a "general obligation" bond (or a property bond), and a "revenue" bond, such as was involved in the case of *Joseph Q. Cipriano v. City of Houma, et al*, 395 U. S. 701, 89 Sup. Ct. 1897, 23 L.Ed 2d 647.

The three-judge court below in the Arizona case found as follows:

> "As in *Cipriano, supra*, we find the challenged Constitutional provision and the challenged Statutes under which the election was held to contain 'a classification which excludes otherwise qualified voters, who are as substantially affected and directly interested in the matters voted upon as those permitted to vote.' There was no evidence before this Court which would justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest. Moreover, in the instant case we find no evidence which would justify a distinction between Revenue Bonds and General Obligation Bonds."

The Court thus concluded its decision as follows:

> "In *Cipriano, supra*, in order to avoid significant hardships on cities' bondholders and others, the Court held the rule of that case would be applied prospectively, 'only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision.'
>
> "In the instant case the authorization to issue the securities was not legally complete by June 16, 1969, (the date of the *Cipriano* decision) nor had the time expired

within which the election could have been contested. In the instant case we find the Arizona Constitutional and Statutory exclusions involved in the election called by the City of Phoenix and held June 10, 1969, to be violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States."

Accordingly, the Court has invalidated the property bond laws of Arizona, and denied prospective relief by applying the June 16, 1969, date of the Cipriano decree, as the cut-off date.

In the Tangipahoa case the Supreme Court of Louisiana rendered a final judgment and decree on Monday, December 15, 1969 (rehearing denied), sustaining a sixty-day constitutional prescriptive plea arising under Article XIV, Section 14(n) of the Louisiana Constitution.[4] (See exhibit A for a copy of the decree.) This sixty-day prescriptive period is the same period as was recognized by this Court as valid in the Cipriano case, supra, where strictly a revenue bond was involved. Article XIV, Section 14 of the Louisiana Constitu-

[4](n). **Contest of bond issue or tax; time.** For a period of sixty (60) days from the date of promulgation of the result of any election held under the provisions of this section, any person in interest shall have the right to contest the legality of such election, the bond issue provided for, or the tax authorized, for any cause; after which time no one shall have any cause or right of action to contest the regularity, formality, or legality of said election, tax provision, or bond authorization, for any cause whatsoever. If the validity of any election, special tax or bond issue authorized or provided for, held under the provisions of this section, is not raised within the sixty (60) days herein prescribed, the authority to issue the bonds, the legality thereof and of the taxes necessary to pay the same shall be conclusively presumed, and no court shall have authority to inquire into such matters. The provisions of this section shall not apply to the City of New Orleans.

tion[1] applies both to property bonds [Article XIV, Section 14(a)], and to revenue bonds [Article XIV, Section 14(m).][5]

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[5] (m). **Revenue bonds; acquisition, etc., of utilities.** For the purpose of constructing, acquiring, extending or improving any revenue-producing public utility, the Legislature may authorize municipal corporations to issue bonds secured exclusively, principal and interest, by mortgage on the lands, buildings, machinery and equipment and by pledge of the income and revenues of such public utility. Such bonds shall not be a charge upon the other income and revenues of the municipality and shall not be included in computing the indebtedness of the municipality for the purpose of any limitation herein.

For the purpose of constructing, acquiring, extending or improving any revenue producing public utility, as defined by the Legislature, the Legislature may authorize any political subdivision or taxing district authorized to issue bonds under authority of this Section 14, excluding municipal corporations, to issue its revenue bonds; which bonds shall be fully negotiable, shall bear interest at a coupon rate not exceeding six per cent per annum, shall mature serially or otherwise not later than forty years from their date, shall not be a charge upon any income or revenue of the district or municipality not derived from the utility, and shall not be included in computing the indebtedness of the subdivision or district, for the purpose of any limitation contained in the Constitution. The Legislature shall provide that any bonds issued hereunder shall be secured by a conventional mortgage on the entire utility so constructed, acquired, extended or improved, and by pledge of the income and revenues thereof, sufficient in amount to pay principal of and interest on said bonds as they severally mature; which security may be foreclosed by seizure and sale of the encumbered property in the manner provided by law for the foreclosure of conventional mortgages, including the right to executory process, and the Legislature shall provide for the granting of a franchise to the purchaser at foreclosure sale, if any, which franchise shall run for a period not exceeding forty years from the date of such sale and shall be subject to any other constitutional or statutory limitations pertaining to the granting of municipal franchises. The Legislature shall also provide that when bonds are issued hereunder, the issuing subdivision or district must impose rates for the services rendered by the utility fully sufficient to operate and maintain the utility, to pay principal of and interest on the bonds, and to provide an adequate fund for depreciation, improvements and extensions, and provisions may be made for encumbering two or more utilities for the construction, acquisition, extension or improvement of any one or more of the utilities encumbered. The Legislature may, in its discretion, require an election by the tax-paying voters of the subdivision or district as a condition precedent to the issuance of such bonds, in which case the voters' qualifications shall be governed by the provisions of this Section XIV. pertaining to other bond elections. If the validity of any bonds issued here-

The judgment and decree of the Louisiana Supreme Court in the Tangipahoa case will be under consideration by this Court upon an application for writs of review to this Court to be filed prior to the time the appeal from the decision rendered below in the City of Phoenix case would normally be disposed of by this Court.

STATEMENT

The Police Jury of the Parish of Tangipahoa, Louisiana, as the governing authority of Road District No. 505 of Tangipahoa Parish, Louisiana, and as Amicus Curiae, adopts the Statement of the Case appearing in the Statement by appellant, City of Phoenix, Arizona, upon the jurisdictional question, as amplified by the Stipulation of Fact contained in the transcript of the proceedings in the three-judge Court below.

SUMMARY OF THE ARGUMENT

This brief deals with the merits of the case here to establish the fact that in Arizona where a combination real property and non-real property bond was involved whatever the conclusion of this Court upon the merits that under the doctrine of hardship emphasized in Cipriano, such ruling should be made prospective. The vital necessity for prompt,

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under be not questioned in litigation commenced within thirty days from the date of publication of the ordinance or resolution authorizing the issuance of such bonds, the authority to issue the bonds, the legality thereof, and the security therefor, shall be conclusively presumed and no court shall thereafter have authority to inquire into such matters. Any law or laws enacted by the Legislature for the purpose of putting this added paragraph to Subsection (m) into effect and which may have been finally passed by the Legislature after the passage of the joint resolution proposing this amendment and prior to the adoption of said amendment by the electors of Louisiana, shall be valid and fully effective if and when said proposed amendment be adopted.

full appearance at this time is the fact that here the national import and the importance of the jurisdictional question can only be evaluated by this Court if full consideration is given to the merits of the Arizona decision as this decision might be interpreted and applied in other states, and particularly as it might be interpreted and applied to strictly property bond elections in the State of Louisiana, where the decision of the three-judge Court below is based primarily upon the Cipriano case, supra, a revenue bond arising in Louisiana in which the prospective date of the decree was made effective on June 16, 1969.

ARGUMENT

As was found by the Supreme Court of Louisiana, the election held in the Tangipahoa case was conducted in strict compliance with the Constitution and laws of Louisiana. The results were promulgated on June 19, 1969, and duly published as required under Louisiana law. The suit in the Tangipahoa case was not filed until November 19, 1969, subsequent to the June 16th date, and subsequent to the running of the sixty-day constitutional prescriptive or peremptive period.

The language of the three-judge decision in the City of Phoenix case has "stymied" or deterred the sale of the Tangipahoa Bonds and of property bonds generally in Louisiana for multiple essential public purposes, even though (i) the June 16th date fixed by this Court in the Cipriano case, supra, is not applicable, (ii) the reasoning of this Court both in Cipriano, supra, and in the companion case of *Kramer v. Union Free School District No. 15*, 395 U. S. 621; 89 S.Ct. 1886, 23 L. Ed.2d 583, when interpreted in relationship to the law of Louisiana governing general obligation bonds will justify this

Court in holding that the exclusion of non-taxpaying qualified electors in the Tangipahoa case are necessary to promote a compelling State interest justifying under Louisiana law circumstances limiting the franchise to those primarily interested, who are the qualified taxpaying electors, (iii) the Tangipahoa Bonds and many other issues similarly situated are entitled under the rule of "prospective application" to be proceeded with without delay.

There is a basic distinction between general obligation bonds and revenue bonds as were involved in the Cipriano case, supra, where this Court stated:

> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like non-property owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and non-property owner alike."

The Court there emphasized that the classification embodied in the revenue bond law of Louisiana attempted to establish and maintain in effect an arbitrary classification "which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as those who are permitted to vote."

The Court emphasized that such classifications where a bond election is involved must provide a "rational basis" for limiting the franchise to those voters with a special interest, and that the statute there under consideration "clearly" did "not meet the 'exacting standard of precision we require of

statutes which selectively distribute the franchise.' *Kramer v. Union Free School District No. 15*, ante, at 11."

The stipulation of fact relied upon by the three-judge court in the present case may not be contained in the petition filed upon the jurisdictional point. It should be found in the certified transcript of the proceedings of the Court below in connection with the appeal. This stipulation establishes without question the fact that plaintiff paid "excise" taxes to the City of Phoenix on all items purchased within the said City of Phoenix that were subject to such excise taxes, and that these excise taxes were commingled with a general fund out of which the City of Phoenix annually and historically paid the debt service, when due, upon its general obligation bonds, including the bonds voted upon, and that for the fiscal year 1969-1970 only $2,350,000 of the annual general obligation debt service requirement of $5,594,973 was to be paid by levy of ad valorem property taxes, and the remaining $3,244,773 was to be paid from other sources, including the excise taxes.

We quote from the stipulation of fact the following:

> "* * * The ratio between real property tax collections and other source monies is representative of the recent years' apportionments for debt service on general obligation bonds. Plaintiff directly contributes to all funds raised from sources other than real property taxes, and plaintiff is derivatively affected by the levy of a real property tax insofar as it affects the cost of goods and services."

Further, under Article VII, Section 13 of the Constitution of Arizona (see Appendix A to appellant's pleadings filed herein) questions upon bond issues, or special assessments are

submitted to the vote of only "real property taxpayers," rather than the vote of the taxpayers otherwise directly subjected to the tax under the plan, and since all of these taxes went into the general fund of the City of Phoenix, out of which the general obligations were paid, plaintiff or members of his "class" paid ad valorem taxes levied upon personal property, and/or incorporeal rights in addition to the excise taxes which the class was admittedly paying.

Under Louisiana law the special tax necessary to meet debt service requirements on general obligation bonds are separately levied, collected, deposited, and paid out, and no commingling of tax monies are permitted with other general fund money.

Further, in the Tangipahoa case the taxpaying voters primarily interested are exclusively subject to the seizure and sale of their property if the taxes are not paid.

It is to be noted that general obligation bonds authorized by Article XIV, Section 14(a) of the Louisiana Constitution[1] empowers the governing authorities of subdivisions of the State in connection therewith to "impose and collect annually in excess of all other taxes a tax sufficient to pay the interest annually, or semiannually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to retire said bonds at maturity."

An entirely different premise is presented in estimating the compelling state interest in Louisiana, and thus, it is important to Louisiana, and to all of the states that are involved, that the Arizona decision as written below should not be left without a more detailed explanation of what the Court was really talking about when it concluded that there was no

evidence before the Court that justified the conclusion that the "exclusions under Arizona law were necessary to promote a compelling state interest," and furthermore, that they did not find "facts which would justify a distinction between revenue bonds and general obligation bonds under the laws of that state."

A great direct harm that is done particularly to Louisiana is the fact that in the footnote to the Arizona decision direct reference is made to the Cipriano case, a case arising and decided under Louisiana law. The implication is that the doctrine of the Cipriano case is to be applied to general obligation bonds in Louisiana, as of June 16, 1969, the date of the Cipriano decree.

Pretermitting any assumption as to what the conclusion of this Court will be upon the merits in the Tangipahoa case it does appear convincingly that under the hardship doctrine and the prospective application rule enunciated and emphasized in the Cipriano case, supra, the June 16, 1969, deadline fixed in that case is not to be interpreted as preventing Louisiana and other states from selling general obligation bonds essential to public services in the meantime, if the full sixty-day constitutional prescriptive and peremptive period following publication of the election results has expired without the filing of any such suit. Until this Court finally acts upon a proper case involving a general obligation bond (property bond) such as will be presented to this Court in the said Tangipahoa case local political subdivisions should be upheld in relying upon the prospective application of the Cipriano case.

In the Cipriano case, supra, the Court emphasized that:

> "* * * Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 386 (1932). See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). Cf. *Linkletter v. Walker*, 381 U.S. 618 (1965).* * *"

There, the Court in a concluding and what would appear to be a rather conclusive statement said:

> "* * * Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization."

Manifestly under the equitable doctrine of hardship the Court was restricting the import of its decision to cases involving revenue bonds of the kind there involved. Plainly thereunder, the June 16th date is not to be applied to any case (even the present City of Phoenix case) where whatever the reasonableness of the classification, the people of Arizona and other states are entitled to the protection against the injustice or hardship by a ruling of non-retroactivity where a **general obligation bond** is involved, even though in Arizona, or in a given case this Court might conclude that the classification relied upon fails to meet the exacting standard of

precision discussed in the cases of both Kramer and Cipriano, supra.

CONCLUSION

Amicus Curiae has been required to prepare the present brief without the benefit of the Supreme Court record, and/or without the benefit of the certified transcript of the proceedings in the three-judge court, except certain excerpts therefrom. Because of this hurried action the appendices and references may not fully conform to all of the Rule requirements. Such action seems warranted if not indispensable where the parties in this case are moving the case in this Court to the point of jurisdictional determination and final decision as rapidly as circumstances will permit.

If permitted by this Court to do so, Amicus Curiae will prepare and file a further brief upon the merits, if the jurisdictional fact is recognized by this Court and the case is fixed for full hearing under the Rules of the Court.

Respectfully submitted,

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CERTIFICATE

I, undersigned counsel for Amicus Curiae, Police Jury of the Parish of Tangipahoa, Louisiana, the governing authority of Road District No. 505 of Tangipahoa Parish, Louisiana, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

This _____ day of January, 1970.

_____

EXHIBIT A

SUPREME COURT OF LOUISIANA

STRICK CHAMBERS

v. No. 50,244

ROAD DISTRICT NO. 505
OF TANGIPAHOA PARISH,
LOUISIANA, ET AL.

APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT FOR THE PARISH OF TANGIPAHOA, STATE OF LOUISIANA; HONORABLE WILLIAM M. DAWKINS, JUDGE

HAMITER, Justice.

In this suit, brought against Road District No. 505 of Tangipahoa Parish, Louisiana, and also against the Police Jury and certain named officials of such parish, Strick Chambers challenges the validity or legality of a bond and tax election called by the governing authority of the Road District and held on June 7, 1969.

The plaintiff is a non-property owning resident, but a qualified elector of the parish; and, as such, he represents (besides himself) others of a class similarly situated. In his petition it is urged that he and the other members of the class were discriminated against in the bond and tax election by virtue of their not having been permitted to vote in the election which approved the issuance of the bonds, this because they did not own taxable property in the parish. He relies primarily on two cases recently decided by the United States

Supreme Court, namely: Kramer v. Union Free School District No. 15 et al., ___ U. S. ___, 23 L. Ed. 2d. 583 and Cipriano v. City of Houma et al., ___ U. S. ___, 23 L. Ed 2d. 647 (hereinafter discussed).

All defendants tendered a plea of peremption alleging that plaintiff's action is barred by virtue of the provisions of Article 14, Section 14(n) of the Louisiana Constitution, and of LRS 39:518. They also filed an answer. Later, the entire case was submitted to the district court on a stipulation of facts.

The court maintained the plea of peremption and dismissed the suit at plaintiff's costs. Plaintiff is appealing.

Here, the case was submitted on a joint motion pursuant to Section 8, Rule VIII, of the Rules of this court.

The constitutional and statutory provisions relied on by defendants to support their plea of peremption authorize suits to contest the legality of bond and tax elections; but they also establish a peremptive period of sixty days from the date of promulgation of the returns of the election, during which period such suits can be brought. They declare, however, that if no suit is filed within such period of sixty days the legality of the election is conclusively presumed, and no court shall have authority to inquire into the matter.

The election here involved was conducted in compliance with the Constitution and laws of Louisiana, and the results were promulgated on June 19, 1969. The instant suit was not filed until November 14, 1969, almost five months after the

promulgation and three months after the peremptive period had expired.

The plaintiff in Andrieux v. East Baton Rouge Parish School Board et al., No. 50,160 of the Docket of this Court, attacked a similar bond and tax election on the same ground as urged by petitioner here. Therein we again reiterated our consistent holding that "the constitutional and statutory peremptive period operates as a complete extinguishment of the right to attack bond and tax elections," it prohibiting thereafter a contest over such elections for any cause whatsoever. See also Gough v. LaSalle Parish School Board, 210 La. 554, 27 So. 2d. 330, Harrel v. Winn Parish School Board, 214 La. 1095, 39 So.2d. 743, Redmon v. Sub-Sewerage District No. of Sewerage District No. 1, Parish of Jefferson, 226 La. 245, 75 So. 2d. 854, and McLavy v. American Legion Housing Corporation et al., 227 La. 300, 79 So. 2d. 316. (Other cases enunciating this principle are cited in Andrieux v. East Baton Rouge Parish School Board et al., supra.)

Inasmuch as the present litigation was not commenced within sixty days after the promulgation of the result of the bond and tax election involved herein the trial judge properly sustained defendants' exception of peremption and dismissed the suit.

We do not agree with plaintiff's counsel that the rendition of the decisions in Cipriano v. Houma et al. and Kramer v. Union Free School District No. 15 et al., both supra, by the United States Supreme Court on June 15, 1969, in any manner affects the result reached by us. To the contrary, we think that the language of the court in both cases specifically recognizes that in order for the holdings to apply the suit at-

tacking the validity of the bond and tax election must be brought within the state's peremptive period.

In the Cipriano case, after holding that in some instances the denial of the right to vote to persons situated as this plaintiff might result in the nullity of the election (as it did there), the court announced its intention to apply the decision only prospectively. But it said: "That is, we will apply it **only** where **under state law**, the time for challenging the election result **has not expired**, or in cases brought **within the time specified by state law and which are not yet final.** * * * Incidentally, that suit had been filed within the state's sixty-day peremptive period. (Underscoring ours.)

As we observed in Andrieux v. East Baton Rouge Parish School Board et al., supra, the United States Supreme Court in the two cases relied on by plaintiff "recognized that state prescriptive or peremptive provisions were valid as a bar to such attacks."

For the reasons assigned the judgment of the district court sustaining defendants' plea of peremption and dismissing the suit at plaintiff's costs is affirmed. Costs of this Court are assessed against plaintiff.

SUPREME COURT, U. S.

FILED
JAN 19 1970
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and concerning the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' SUPPLEMENTAL BRIEF

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and concerning the City Council of the City of Phoenix, Arizona,

---

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' SUPPLEMENTAL BRIEF

In the Jurisdictional Statement, we pointed out that the Opinion and Judgment of the lower court are in conflict with a decision of the Fifteenth Judicial District Court of Louisiana. The Jurisdictional Statement further stated that "the conflict in this case does not involve the United States Courts of Appeal nor State Supreme Courts. . . ." Jurisdictional Statement p. 13.

Subsequent to the mailing of our Jurisdictional Statement, on December 23, 1969, the Supreme Court of Oklahoma handed down two separate decisions whose holdings are in square conflict with the holding of the district court in the instant case.

The holding of the lower court is therefore in conflict not only with a Louisiana district court decision, but also with two decisions of the Oklahoma State Supreme Court.

Because the substantiality of the federal question in this case is borne out by the conflict between the holding of the lower court and the holdings by the Oklahoma Supreme Court, the opinions of that Court are set forth in full as Appendices A and B to this Supplemental Brief.

Respectfully submitted.

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IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tom Settle

Plaintiff

vs.

The City of Muskogee, of the State of Oklahoma; John R. "Bob" Brown, Mayor; Mary Roberts, City Clerk; John Hart; Elmer E. Hoffman, Jr.; Russell Ruby; Frank Hendrickson; Fred Hager; Tom P. Bowen, Mal Kingins; Mary E. Basolo; Charles A. Heirich; Robert C. Coleman; James W. Buchanan; Dr. J. S. Chandler; William H. Pool; and Dr. Frederick D. Smith, constituting the Council of said City

Defendants

No. 43842

ORIGINAL PROCEEDING FOR WRIT OF INJUNCTION
WRIT DENIED

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Roy H. Semtner, Municipal Counselor
James R. Fuson, Assistant Municipal Counselor — For Amicus Curiae City of Oklahoma City

DAVISON, J.

This is an original action in this court in which we are called on to determine the validity of Art. 10, §27, of the Oklahoma Constitution. Plaintiff contends Art. 10, §27, is unconstitutional on the gronnd that the limitation therein, requiring persons voting at the election therein to be "qualified property tax paying voters," violates the equal protection clause in the Fourteenth Amendment to the United States Constitution.

We accept original jurisdiction of the action because of the public importance of the matter and the need for an early determination of the involved question.

There is no dispute as to the following facts. Plaintiff is not a property taxpayer, but is an otherwise qualified voter in the City of Muskogee. On May 6, 1969, the City, under authority of Art. 10, §27, of the Oklahoma Constitution, held a special election submitting to the registered qualified property tax paying voters of the City the proposition of whether the City should incur an indebtedness by issuing its bonds in the sum of $750,000, to provide funds for the purpose of acquiring a site for and constructing, furnishing and equipping a public library to be owned exclusively by the City, and to levy and collect an annual tax upon all taxable property in the City sufficient to pay the interest,

and the principal of said bonds as they became serially due, within 25 years. The proposition received the required constitutional majority vote in favor thereof. Plaintiff was not allowed to vote in this election because he was not a property taxpayer.

The City commenced proceedings to sell the bonds. The Attorney General of Oklahoma, as ex-officio Bond Commissioner of the State of Oklahoma, duly approved said bonds.

Plaintiff then filed this action for himself and all others in his class against the City and its officers and council. He alleges the facts above narrated and further alleges his interest, and the interest of all members of the community, in the quality of public utilities and in the financing and construction of a public library, and his conclusion that property tax levels affect the price of goods and services in the community. He prays that the election be declared invalid and that the defendants be enjoined from issuing the bonds, on the ground that Art. 10, §27, violates the Equal Protection Clause.

Art. 10, §27, of the Oklahoma Constitution allows a city, by a majority of the "qualified property tax paying voters" of such city, voting at an election held for that purpose, to become indebted *in a larger amount than that specified in Section 26*, for the purpose of purchasing or constructing utilities, or for repairing the same, to be owned exclusively by such city; and provides that the city shall collect an annual tax in addition to the other taxes provided for by the Constitution, sufficient to pay the interest and principal of such indebtedness within 25 years.

Art. 10, §26, of the Constitution provides, among other things, that no city shall be allowed to become indebted to an amount exceeding, in one year, the income and revenue provided for such year, without the assent of three-fifths of the *voters* thereof, voting at an election held for that purpose, "nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate ex-

ceeding five per centum of the valuation of the taxable property therein, * * *."

The sole issue presented in this case is whether the classification of voters in Art. 10, §27, violates the Fourteenth Amendment's command that no State shall deny persons the equal protection of the laws, by providing that only qualified property tax paying voters are permitted to vote for the purpose therein set forth, and thereby rendering ineligible to vote those otherwise qualified voters who do not pay taxes on real or personal property.

In Henry v. Oklahoma City, 188 Okl. 308, 108 P.2d 148, 152, involving the duties of election officials, we stated that the purpose of the above provision in Art. 10, §27, was to render those qualified voters who do not pay taxes on real or personal property ineligible to vote at an election on the proposition of incurring indebtedness for municipally owned public utility improvements.

This court in many cases (including Bekins v. City of Tulsa, Okl., 299 P.2d 792; City of Shawnee v. Williamson, Okl., 338 P.2d 355, and City of Tulsa v. Williamson, Okl., 276 P.2d 209) has approved numerous bond issues and determined questions raised in connection therewith, all of which arose out of elections held pursuant to Art. 10, §27. However, none of our cases involved the issue now presented to this court.

From our examination of the authorities we conclude that mere classification of persons for franchise or other purposes is not of itself invalid. The test of the validity thereof is whether, under the circumstances, the classification complies with, or violates, the stated rules of law governing such situations.

In Haas v. Holloman, Okl., 327 P.2d 655, we stated the rule that where a statute operates upon a class, the classification must not be capricious or arbitrary and must be reasonable and pertain to some pecularity in the subject-matter calling for the legislation.

And, in Walters v. City of St. Louis, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505, (1954) the court stated:

" ***. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned

differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

The United States Supreme Court has held that States may, within limits, fix voter qualifications.

In Carrington v. Rash, 330 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775, (1965) the court said:

" ***. There can be no doubt either of the historic function of the States to establish, on a nondiscriminary basis, and in accordance with the Constitution, other qualifications (than residence) for the exercise of the franchise. Indeed '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised' Lassiter v. Northhampton Election Bd., 360 U.S. 45, 3 L.Ed.2d 1072, 1076, 79 S.Ct. 985."

We also find in Avery v. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968), the following statement: "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanism of local government suitable for local needs and efficient in solving local problems."

Plaintiff cites and relies upon Kramer v. Union Free School District, ...U.S....., 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969), and Cipriano v. City of Houma, ...U.S....., 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969). In the Kramer case a law of the State of New York establishing a classification of voters permitted to vote at a school board election was declared unconstitutional. In the Cipriano case a law of the State of Louisiana giving only "property taxpayers" the right to vote in elections called by a municipality to approve the issuance of revenue bonds for the purpose of acquiring, extending or improving revenue-producing public utilities was declared unconstitutional.

Our approach to the determination of the question presented in the case now before us will be that used in the Kramer case in which the court stated as follows:

"'In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968)."

We construe Kramer and Ciprjano to hold that a statute or a state constitutional provision having a voter classification restricting the right to vote to one class, thus denying it to another class, is not violative of the equal protection clause, (1) where the exclusions are necessary to promote a compelling state interest, and (2) where those excluded are in fact substantially less interested or affected than those included. We also consider the question of whether the classification in Art. 10, §27, limits the franchise to those voters "primarily interested." These are the tests to be applied to Art. 10, §27, Oklahoma Constitution.

Under the provisions of Sec. 27, the election is held, not only to secure approval of incurring municipal indebtedness, but to also secure approval of the important and essential matter of levying a specific additional tax on the property of taxpayers sufficient to pay the principal and interest of the indebtedness. An otherwise sufficient vote pursuant to Sec. 27, is without effect unless provision is made to make the tax levy. Application of City Council of City of Tahlequah, Okl., 285 P.2d 418. When this procedure is followed and the property tax paying voters approve the debt and levy of taxes upon their property, the city may incur indebtedness in excess of the debt limitation of five per centum of the valuation of taxable property otherwise prescribed in Art. 10, §26. In this manner a city may incur indebtedness greater than that allowed by Sec. 26.

It is self-evident that the drafters of the Constitution recognized the need and value of public utilities to the State's people and economy, and it is also apparent that they knew the importance of municipal solvency. Thus, the general electorate may vote on the creation of indebtedness to the extent provided in Sec. 26, but

authorization of indebtedness in excess thereof was restricted by Sec. 27 to a favorable vote by property tax paying voters, whose property is subject to a tax levy to pay the approved indebtedness.

By such a plan and classification the solvency of Oklahoma's cities and towns is virtually assured and the taxpayers are given protection against confiscatory taxes. This conclusion is justified, because the power to authorize the city to incur unlimited indebtedness for public utility purposes is placed in the hands of those persons who pay the indebtedness and who have knowledge of the municipality's capability of satisfying its indebtedness from the proceeds of a special tax on their property. These are the compelling State interests.

We now turn to the question of whether the plaintiff and other persons excluded from voting by reason of not being taxpayers are substantially less interested or affected than those persons permitted to vote. In discussing this proposition in Kramer the court treated it as a part of the "compelling state interest" test. This is our construction of the Kramer decision.

Defendants admit that plaintiff is to some extent "interested," and we can conceive that plaintiff could be "affected" in some degree by reason of the city incurring indebtedness and levying a tax on property to finance a public utility (in this case a library), even though plaintiff is not a taxpayer. However, we are of the opinion that in the present situation the plaintiff is substantially less interested or affected than those persons permitted to vote in the election. Our prior discussion regarding "compelling state interest" supports this conclusion.

We point out that this is not an election for the selection of a person for a public office, whose official acts involve legislative or executive duties of a discretionary nature. The election is to incur municipal indebtedness, and the result thereof and the law control the later action to be taken relative to the subject matter. We emphasize that this is an election under a constitutional provision authorizing an indebtedness in excess of the maximum

amount the general electorate may approve. It is to be satisfied by a tax paid by property taxpayers who are primarily interested or affected by reason of an increase in the city's debt and their taxes. Plaintiff does not pay any tax. His resulting detriment or expense, if any, arising from the higher tax level, is a proportionate part of the relatively small additional expense spread across the population of the city. The extent to which plaintiff is interested or affected is indirect and remote.

It is our conclusion that Art. 10, §27, Oklahoma Constitution, complies with the test requirements set forth in Kramer and Cipriano.

It is our further conclusion that Art. 10, §27, validly limits voting to those persons "primarily interested."

The facts in Kramer and Cipriano are not the same as those in the present case.

In Kramer the classification involved persons entitled to vote at a school board election. The statute presented a complicated formula under which the only persons entitled to vote were those falling within one or more classifications, consisting of the owner or lessee of taxable property, or the spouse thereof, or the parent or guardian of a child enrolled in school for a specified time during the preceding year. The court demonstrated and found that the classification permitted inclusion of persons who had, at best, a remote and indirect interest in school affairs, and excluded others who had a distinct and direct interest in school meeting decisions. The court said the requirements of the law were not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs. This is not the situation in the present case.

In the Cipriano case the law restricted voting on public utility *revenue* bonds to property taxpayers. The revenue bonds were not financed in any way by property tax revenue, but were paid only from revenue deprived from operations of the utilities. The court said that both property owners and non-property owners used the

utilities and paid the rates, and consequently the statutory classification excluded otherwise qualified voters who were as substantially affected and interested in the matter voted upon as were those who were permitted to vote. In the present case the bonds are not revenue bonds. They are paid by the property taxpaying voters.

It is our conclusion that Art. 10, § 27, of the Oklahoma Constitution does not violate the Equal Protection Clause of the Fourteenth Amendment.

Writ denied.

ALL JUSTICES CONCUR.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tom Settle, Plaintiff vs. Board of County Commissioners of the County of Muskogee, of the State of Oklahoma; Norman Brazil, Chairman, and Kenneth Ward, Member and Fred Shelton, Member, constituting the Board of County Commissioners of said County, Defendants	No. 43812

ORIGINAL PROCEEDING FOR WRIT OF INJUNCTION
WRIT DENIED

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Tim Leonard, Assistant Attorney General — For Amicus Curiae

J. B. Marshall
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DAVISON, J.

Plaintiff files an original action in this court attacking the constitutionality of Art. 10, §35, of the Oklahoma Constitution, which was adopted at a special election held May 1, 1962. Plaintiff contends Art. 10, §35, is unconstitutional on the ground that the requirement therein, limiting voting at the election therein provided to "qualified taxpaying voters," violates the equal protection clause in the Fourteenth Amendment to the United States Constitution.

We accept original jurisdiction of the action because of the public importance of the matter and the need for an early determination of the question.

This case presents an issue similar to the one considered in Settle v. City of Muskogee, Oklahoma, ...P.2d....., this day promulgated.

The parties agree on the following facts. Plaintiff is not a real or personal property taxpayer of Muskogee County, but is otherwise qualified to vote in Muskogee County. On September 9, 1969, the County, under authority granted in Art. 10, §35, held a special election submitting to the registered qualified taxpaying voters of the County the proposition of whether the County should incur an indebtedness by issuing its bonds in the sum of $2,000,000, to provide funds for the purpose of securing and developing industry in the County, and to levy and collect an annual tax upon all real and personal property in the County but not in excess of 5 mills, sufficient to pay the principal and interest on the bonds as they became due, within 30 years. The proposition received the required favorable vote. Plaintiff was denied the right to vote because he was not a taxpaying voter.

The County officers are now threatening to issue a portion of the bonds and use the proceeds for the purposes set forth in the Proposition.

Plaintiff filed this action against the County and its Commissioners, alleging the facts above set out, alleging he and the mem-

bers of the community have an interest in the development of new industry and the resulting change in the economic structure, and that all qualified electors should be allowed to vote on the Proposition. He alleges that the level of property taxation affects the price of goods and services. He prays that the election be declared invalid and the defendants enjoined from issuing bonds on the ground that Art. 10, §35, and the election violate the Equal Protection Clause.

Art. 10, §35, Oklahoma Constitution, provides that a county may, by consent of the majority of the "qualified taxpaying voters" of the county voting at an election thereon, issue bonds for the purpose of securing and developing industry within the county, and levy a special annual tax, not to exceed 5 mills on the dollar, on the real and personal taxable property therein to pay the bonds within 30 years. It provides that the county commissioners shall have jurisdiction over the sale of the bonds and that they shall economically expend the funds, and give them authority to coordinate their industrial development plans and projects insofar as practical with those of local industrial development agencies.

The sole question presented is whether the exclusion of plaintiff from voting on the bonds, because he was not a property taxpayer, violates the equal protection clause in the Fourteenth Amendment.

In Settle v. City of Muskogee, supra, we stated the general rules of law governing classifications of persons and voters, citing Haas v. Holloman, Okl., 327 P.2d 655; Walters v. City of St. Louis, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505 (1954) and Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775 (1965). We adopt these rules as being equally applicable in the present case.

In addition thereto, we find in Avery v. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968), the following statements: "The Equal Protection Clause does not, of

course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious," and "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."

Plaintiff cites and relies upon Kramer v. Union Free School District, ...U.S....., 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969), and Cipriano v. City of Houma, ...U.S....., 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969).

In determining whether Art. 10, §35, violates the equal protection clause, we consider the facts and circumstances of the law, the interests the State claims to be protecting, and the interests of those allegedly disadvantaged by the classification. Kramer v. Union Free School District, supra.

We construe Kramer and Cipriano to hold that a statute or state constitutional provision having a voter classification is not in violation of the equal protection clause, (1) where the exclusions are necessary to promote a compelling state interest, and (2) where those excluded are in fact substantially less interested or affected than those included. In connection with the above propisitions we also consider the question of whether the classification in Art. 10, §35, limits the franchise to those voters "primarily interested."

It is clear from the provisions of Art. 10, §35, that the Legislature in proposing the adoption thereof, and the electorate in adopting the same, concluded it was desirable and beneficial to secure and develop industry in the State. To accomplish this purpose, Sec. 35 provides a procedure by which the county may incur additional indebtedness and a means by which the indebtedness is to be paid. The decision to accomplish the purpose of Sec. 35, and to procure for the community the benefits contemplated therein, rests with the qualified taxpaying voters. Their decision to incur the debt for this particular purpose subjects their prop-

erty to a specific additional tax to satisfy the debt, with no liability on the part of non-taxpaying voters. In other words, taxpaying voters create the debt for this purpose, and only their property is ultimately liable for judgment of the debt.

We now take up the question of whether plaintiff and persons in his class are substantially less interested or affected than those persons permitted to vote.

We assume that plaintiff and some persons in his class are "interested," and we can conceive that they are "affected" in some small degree by the securing and developing of industry in the community with the resulting contemplated benefits. However, we are here dealing with a distinct classification, those who are directly interested and affected by incurring the debt and subjecting their property to taxes for a special purpose, and those who in our opinion are indirectly and remotely affected by such action. This is not like an election to select for public office, the impact of whose official and discretionary acts directly affect the people as a whole or voters as a group.

It is our conclusion that Art. 10, §35, validly excluded plaintiff and his class from voting to promote a compelling state interest. It is our further conclusion that plaintiff and his class are substantially less interested or affected than the property taxpaying voters permitted to vote at the election.

Based upon these conclusions and the circumstances of this case, we are of the opinion that Art. 10, §35, validly limits voting to those persons "primarily interested."

In our decision in Settle v. City of Muskogee, supra, we discussed the obvious lack of similarity of the state laws and circumstances in Kramer and Cipriano to those in the City of Musko-

gee case. We adopt this discussion to show that the facts in Kramer and Cipriano are clearly distinguishable from those in the present case.

It is our conclusion that Art. 10, §35, of the Oklahoma Constitution does not violate the Equal Protection Clause of the Fourteenth Amendment.

Writ denied.

ALL JUSTICES CONCUR.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

CITY OF PHOENIX, ARIZONA, et al.,

Appellant,

vs.

EMILY. KOLODZIEJSKI,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR POUDRE SCHOOL DISTRICT R-1, LARIMER COUNTY, COLORADO, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

In accordance with U. S. Sup. Ct. Rule 42 (4), this brief is filed on behalf of and is sponsored by the legal representative of Poudre School District R-1, Larimer County, Colorado, a political subdivision of the State of Colorado.

Pursuant to proper procedures of the District Board of Education, a school bond election was properly held in the District on October 14, 1969. At that election the question of issuing general obligation bonds in the amount of $18,500,000 was submitted to the qualified taxpaying electors of the District only, in accordance with Article XI, Section 7

of the Constitution of Colorado, and as defined by Colorado Revised Statutes 1963, 1965 Perm. Cum. Supp. 123-11-1 (4). The results of said election were duly canvassed and certified at a meeting of the Board on October 15, 1969, such certification showing that there were 3,282 votes for the bonds and 2,547 votes against the bonds.

A public sale of a portion of the bonds so authorized was scheduled and advertised for December 8, 1969. Because of the decision of the trial court in this cause entered on November 17, 1969, great uncertainty was cast on the validity of bonds so authorized by taxpaying electors only, and the bond sale was cancelled.

In holding certain sections of the Arizona constitution and bond laws violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, the court below relied on the rules set down in *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897 (1969), and *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886 (1969). The court below made no distinction between an election authorizing revenue bonds (*Cipriano*) and general obligation bonds.

Furthermore, the trial court gave its decision retrospective effect by making it apply from June 16, 1969, the date of the *Cipriano* decision. This retrospective effect casts doubt on the validity of general obligation bonds authorized solely by taxpaying electors at all elections held between June 16, 1969 and November 17, 1969, the date of the decision below.

The Poudre R-1 School District's interest lies in the dire need to construct and equip adequate school buildings for its children. It has followed the only statutoritly available procedure to provide for such buildings by authorizing payment from the proceeds of its general obligation bonds. The

bonds, however, at this time, are not saleable. To this end, the District urges this court to take jurisdiction and make a prompt decision in the matter.

STATEMENT OF THE CASE

The School District feels the statement of the case made by the City of Phoenix, Arizona, the Appellant herein, is adequate and so adopts the same.

ARGUMENT

Colorado constitutional and statutory provisions applicable to the School District's problem are, in pertinent part, set forth as follows:

Colorado Constitution - Article XI, Section 7. Debt for school buildings - how created.

> "No debt by loan in any form shall be contracted by any school district for the purpose of erecting and furnishing school buildings, or purchasing grounds, unless the proposition to create such debt shall first be submitted to such qualified electors of the district as shall have paid a school tax therein, in the year next preceding such election, and a majority of those voting therein shall vote in favor of incurring such debt."

Colorado Revised Statutes 1963, 1965 Perm. Cum. Supp., 123-11-3. Bonded indebtedness - elections - districts of seventy thousand or less enrollment.

> "(1) The board of education of any school district with a school enrollment of seventy thousand or less, at any regular biennial school election or at a special election called for the purpose, may submit to the registered qualified taxpaying electors of the district the question of contracting a bonded indebtedness for the purpose of purchasing grounds, or for erecting and furnishing school buildings, or for funding floating indebtedness, or for any one or more of said purposes, which purposes shall be broadly construed, subject to the limitations provided in section 123-11-4."

Colorado Revised Statutes 1963, 1965 Perm. Cum. Supp., 123-11-1. Definitions.

"(4) 'Taxpaying elector' and 'qualified taxpaying elector' mean any person who is at least twenty-one years of age, a citizen of the United States, and who has resided in the state for twelve months, in the county for ninety days, in the school district thirty days, and in the school election precinct fifteen days immediately preceding the election at which he offers to vote, and who, during the twelve months next preceding said election, has paid an ad valorem school tax upon property situated within the school district and owned by said person; and the term 'registered qualified taxpaying elector' means a qualified taxpaying elector who has registered pursuant to the requirements of section 123-11-10."

The School District's bonds were authorized in compliance with the quoted Colorado Constitution and Statutes at an election held on October 14, 1969. The bonds are payable from general ad valorem taxes on all taxable property in the District. The bonds, however, are not marketable because of the decision of the court below rendered on November 17, 1969.

This Court in *Cipriano* was careful not to make its decision retroactive. The court below, however, renders *Cipriano* retroactive as to general obligation bonds by adopting the date of the *Cipriano* decision, June 16, 1969, at the effective date of public awareness of the rule of law not only as to revenue bonds but also as to general obligation bonds. The court below has thus retroactively extended the effect of *Cipriano* to general obligation bonds beyond the apparent intention of this Court in its decision concerning revenue bonds.

On December 26, 1969 the Oklahoma Supreme Court rendered two decisions (*Tom Settle* v. *Board of County Commissioners of the County of Muskogee, State of Oklahoma, et al,* No. 43812 and *Tom Settle* v. *City of Muskogee, et al,* No. 43842) holding that Sections 27 and 35 of Article 10 of

the Oklahoma Constitution did not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by limiting the class of voters in bond elections (Section 35) and in elections to increase the City's bonded debt (Section 27) to qualified taxpaying electors. These decisions are in direct conflict with the decision of the court below, and they are also in conflict with *Cipriano* if the rule announced therein is extended to general obligation bonds.

The School District refers to and adopts the list of pending cases enumerated in the brief of the City of Tulsa, Oklahoma, as *Amicus Curiae*. In addition, a case is at issue in a court of original jurisdiction in Colorado Springs, Colorado, involving School District No. 11, El Paso County, Colorado, whereby the plaintiffs seek to invalidate an election to increase the general fund budget, on the grounds that the question was submitted to all qualified electors of the district rather than only to the qualified taxpaying electors as required by statute. *Myron H. Pike, et al v. School District No. 11, El Paso County, Colorado,* El Paso Colorado County Court No. 9069.

The legislature of Colorado convened on January 7, 1970, for its odd year, or "short" session and the Governor has placed on the legislative agenda certain amendments to the laws which attempt to deal with the problems raised by *Kramer, Cipriano* and the decision of the court below, in so far as these problems relate to a constitutionally acceptable limitation of a class of voters authorized to vote in general obligation bond elections. The legislature of New Mexico convenes during the week of January 12, 1970, and will likewise be struggling with the dilemma.

CONCLUSION

In order to remove the uncertainty surrounding the School District's bond election and resolve the question of the market-

ability of its bonds, and in order to lend guidance to other issuing public bodies, state and federal courts and state legislatures, the School District urges this court to take jurisdiction and render a prompt decision on a matter of great public concern.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF COLORADO)
) ss.
COUNTY OF LARIMER)

The undersigned, one of the counsel for Poudre School District R-1, Larimer County, Colorado, as Amicus Curiae, being first duly sworn upon oath deposes and says that a copy of the foregoing brief has been served on all counsel of record by depositing on this date copies thereof in the United States Air Mail, postage prepaid, addressed to each of them, at their respective addresses of record.

B. F. Napheys III

Subscribed and sworn to before me this 22nd day of January, 1970.

(Seal) Notary Public

My commission expires: September 8, 1972

SUPREME COURT, U. S.

FILED

FEB 9 1970

JOHN F. DAVIS, CLERK

No. 1066

In the

Supreme Court of the United States

OCTOBER TERM, 1969

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal From The United States District Court
For The District Of Arizona

BRIEF FOR SALT LAKE CITY, UTAH, AS AMICUS CURIAE

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IN THE

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CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal From The United States District Court
For The District Of Arizona

BRIEF FOR SALT LAKE CITY, UTAH, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of Salt Lake City, a political subdivision of the State of Utah, and is sponsored by the City Attorney of said city, the authorized law officer thereof under Rule 42(4) of the Rules of the Supreme Court of the United States. The nature of the city's inter-

est is that Salt Lake City faces a great need for the issuance of bonds for the purpose of extending and improving the municipal airport facilities of the city. The Civil Aeronautics Board has given the necessary approvals which will permit additional air carriers to utilize the Salt Lake City airport and to provide additional service to persons seeking to use air transportation to and from the city. In order to provide adequate facilities for such additional air service, improvements and extensions are required to be made to the existing airport. The Federal Aviation Administration has made $1,000,000 in grant funds available to the city for related airport projects. In the agreement under which the grant funds were obtained the city committed itself to begin construction by June 30, 1970 and to complete construction of certain facilities by July 9, 1971, and others by 1972. Because of delays in the bonding program for the airport, the city may not have sufficient funds available to complete construction in accordance with the agreement with the Federal Aviation Administration. This failure would put in jeopardy any additional grant funds that might be forthcoming and might result in a demand on the city for repayment of funds already expended on projects, because the conditions of the agreement were not subsequently met by the airport.

Throughout the early part of 1969 representatives of the city and representatives of the air carriers serving Salt Lake City negotiated agreements and leases of airport facilities setting charges for the use of the facilities by the airlines. Underlying the negotiations and the agreements reached between the airlines and the city was the fact that the city would call an election for the purpose of submitting to the qualified taxpaying voters of the city the question of issuing $25,000,000 General Obligation

Airport Bonds of the city for the purpose of defraying the cost of improving and extending the municipal airport of said city by adding to and remodeling the existing airline terminal building and facilities, constructing additional auxiliary buildings and facilities to be used in connection with the operation and maintenance of the airport, improving and rehabilitating airport runways, making site relocation of airport utility facilities made necessary by reason of such improvements and extensions, together with the acquisition of all land necessary therefor, and the acquisition of all appurtenant facilities necessary or convenient in connection with such improvements and extensions, all for the use of the traveling public and others using the municipal airport facilities.

The Board of Commissioners of Salt Lake City, in accordance with the program agreed to with the airlines, had scheduled an airport bond election to be held during the month of August, 1969, but such schedule was abandoned and the bond election indefinitely postponed when the implications of *Kramer* v. *Union Free School District,* 395 U.S. 621; 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), and *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), decided by this court on June 16, 1969, became apparent as to general obligation bonds.

Section 3 of Article XIV of the Constitution of the State of Utah requires bond elections, of the type contemplated by Salt Lake City, to be submitted to a vote of such qualified electors as shall have paid a property tax therein in the year preceding the election. Inasmuch as Section 3 of Article XIV of the Utah Constitution has been interpreted by the Utah Supreme Court to require a taxpayer election on the issuance of some types of revenue bonds, which election qualification as to revenue

bonds was held to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in the *Cipriano* case, the legal authority of the city to call and hold a bond election for airport purposes as originally scheduled was immediately placed in jeopardy. Further, because of the widespread publicity given to questions arising as a result of the *Cipriano* case concerning the constitutionality of the provisions of Utah law providing for the holding of elections on the issuance of bonds, none of which provisions distinguish between requirements for elections on general obligation bonds and on revenue bonds, no market exists for the sale of the bonds of the city until such questions have been resolved. One paramount constitutional question remains after the decisions in the *Kramer* and *Cipriano* cases: Do state constitutional limitations on the right to vote at "general obligation" bond elections also constitute the denial of equal protection of law to nontaxpayers who are nevertheless qualified electors, in violation of the Fourteenth Amendment to the Constitution of the United States?

Salt Lake City faces the exact problem raised by the City of Phoenix in the Jurisdictional Statement filed in this appeal, in that no way exists under which a bond election free from doubt under either the requirements of the United States or Utah Constitutions may now be conducted by Salt Lake City.

Salt Lake City is further interested in this appeal in that it has outstanding millions of dollars of general obligation bonds voted at elections where only taxpaying voters participated. In order that the credit standing of Salt Lake City and of all other issuers of such municipal bonds may be protected, the city urges that any decision on the merits in this case which results in voiding

the general obligation bond propositions voted on by the City of Phoenix be made prospective and specifically not apply to outstanding bonds in the hands of the purchasers thereof.

STATEMENT

Salt Lake City, Utah, as *amicus curiae,* adopts the statement of the case appearing in the Jurisdictional Statement of the City of Phoenix, Arizona, the Appellant.

SUMMARY OF ARGUMENT

The continuing necessity for Salt Lake City, and all other municipal corporations and political subdivisions authorized under state law to issue general obligation bonds, to complete bonding programs and to sell their bonds free from constitutional doubt as to their validity, provides a compelling reason why this court should note probable jurisdiction in this cause and order arguments to be heard at the earliest opportunity. This is especially so because of the conflicting decisions rendered by various state and federal courts on the application of the *Cipriano* case in the few short months since that case was decided. The diversity of results reached in the reported decisions to date has contributed greatly to the paralysis of the municipal bond market in Utah and in all other similarly situated states. *Amicus curiae* does not urge that on the merits the court decide one way or another, but does wish to discuss in this brief the application of the pending case and of the opinions of this court in the *Kramer* and *Cipriano* cases to Utah law and to the financial and funding crisis with which Salt Lake City and numerous other municipal corporations and political subdivisions in Utah and in other states are now faced.

ARGUMENT

Plans of the Board of Commissioners of Salt Lake City, Utah, to call a bond election to be held in the city during the month of August 1969 have been indefinitely postponed until the resolution of the question presented in this case: Did the holdings of this court in *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) and *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) mean that a state may not limit the right to vote at an election upon the issuance of general obligation bonds to those qualified electors who have paid a property tax in the political subdivision calling the election?

The airport expansion program of the city on which depend additional air carrier service for the city and the faith of the city in performing and completing prior commitments with the Federal Aviation Administration, has been completely halted as a result of the *Cipriano* decision. The problem realistically cannot be resolved solely by action in the state courts, or by the state legislatures, although as will be demonstrated efforts along those lines have been and are being made in Utah, but in the last analysis the problem must be initially resolved by this court in its determining the application of *Cipriano* to general obligation bonds.

Section 3 of Article XIV of the Utah Constitution requires that before debt may be incurred an election must be held at which only qualified taxpaying electors may vote.[1] While this requirement has obvious applica-

[1] Two sections of the Utah Constitution deal with property tax qualifications at elections. The two sections are Section 7 of Article IV and Section 3 of Article XIV, which read as follows:

tion to general obligation bonds issued by a political subdivision, the Utah Supreme Court in *Fjeldsted* v. *Ogden City,* 28 P.2d 144 (Utah 1933), held that where bonds normally considered to be "revenue" bonds, and hence free from constitutional debt limitations, are nevertheless payable from the revenues of existing facilities in addition to the revenues arising from the facilities to be constructed with the bond proceeds, a debt within the meaning of Section 3 of Article XIV of the Utah Constitution is contracted and a taxpayer election is required in order to authorize the issuance of the revenue bonds. The doctrine so adopted by the Utah Supreme Court is usually referred to as the "restrictive special fund doctrine." In *Thompson* v. *City of Centerville,* 417 P.2d 670 (Utah 1966), the Utah Supreme Court held that contract purchasers of real property and spouses of taxpayers which spouses did not own property on the tax rolls, could not be permitted to vote at a bond election.

The Utah Municipal Bond Act, Section 11-14-1 *et seq.* of the Utah Code Annotated 1953, as amended, constitutes

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[1] (Continued)

Sec. 7 [Property qualification, when forbidden.]

Except in elections levying a special tax or creating indebtedness, no property qualification shall be required for any person to vote or hold office.

Sec. 3. [Debts of counties, cities, towns, and school districts not to exceed revenue—Exception.]

No *debt* in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt.

the legislative authority under which most Utah general obligation and revenue bonds are voted and issued. The Utah Municipal Bond Act, in Sections 11-14-2 and 11-14-5 limits the right to vote at bond elections to qualified taxpaying electors of the issuing political subdivision.[2] In view of the problems concerning municipal bond elections arising from the *Cipriano* decision and the litigation

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[2] Sections 11-14-2 and 11-14-5, Utah Code Annotated 1953, as amended, both part of the Utah Municipal Bond Act, read as follows:

> 11-14-2. Election on bond issues required—Contents of resolution and election notice.—The governing body of any municipality desiring to issue bonds pursuant to the authority granted in section 11-14-1 shall by resolution provide for the holding of an election therein on the question of the issuance of such bonds, and such bonds may be issued only if at such election the issuance thereof shall have been approved by a majority of such qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election, who vote on the proposition. This section does not require an election for the issuance of refunding bonds or other bonds not required by the Constitution to be voted at an election. The resolution calling the election and the election notice shall state the purpose for which the bonds are to be issued, the maximum amount of bonds to be issued, the maximum number of years from their respective dates for which such bonds may run, and the maximum rate of interest which they may bear. The purpose may be stated in general terms and need not specify the particular projects for which the bonds are to be issued or the specific amount of bond proceeds to be expended for each such project. In addition, if the municipality is an improvement district and if the bonds are to be payable in part from tax proceeds and in part from the operating revenues of the district or from any combination thereof, the resolution and notice shall so indicate, but need not specify how the bonds are to be divided as to source of payment.

presently pending in Utah[3] and elsewhere on the subject,

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[2] (Continued)

11-14-5. Qualified electors at bond elections—Determining voters' qualifications.—The words "qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election" as used herein shall have the same meaning as do the same words appearing in section 3 of Article XIV of the Utah Constitution. Election officials conducting bond elections and county officials whose duty it may be to supply records to such election officials for use in determining voters' qualifications shall interpret the aforesaid words in the light of the following instructions:

(a) A qualified elector shall be deemed to have paid the required property tax in the municipality or other entity so proposing to issue the bonds if he owns any property therein, title to which is held in his name, and he has paid any property tax thereon during the twelve months preceding the election.

(b) The spouse of any person mentioned in subparagraph (a) shall not be deemed to have paid a property tax unless such spouse can qualify independently under the terms of subparagraph (a).

A person whose name appears on the official assessment and tax rolls of the county or counties in which the municipality or entity is located as having paid a tax on property in the municipality or entity during the twelve-month period immediately preceding the bond election shall prima facie be considered to have paid the property tax required to qualify him to vote in the election.

[3] In *Cypert* v. *Washington County School District,* Civil No. 4146, Fifth Judicial District in and for Washington County Utah, plaintiff seeks to enjoin the sale of certain general obligation school bonds voted at an election held on May 27, 1969, where the contest period provided for by Utah law had not expired on June 16, 1969. The *Cypert* case has been tried and submitted to the trial judge but no decision has as yet been rendered. In *Anderson* v. *Ogden City,* Civil No. 50717, District Court of

the Utah Senate on January 27, 1970, and the Utah House of Representatives on January 29, 1970, adopted Senate Bill No. 3 of the 1970 Regular Session of the Utah Legislature, amending Section 11-14-2, Utah Code Annotated, 1953, as amended, to provide that if the taxpaying elector requirement of Section 3, Article XIV, of the Utah Constitution shall ever be removed by vote of the people or declared to be in violation of the requirements of the Constitution of the United States that all qualified electors may henceforth vote at all bond elections.[4] It is obvious that

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[3] (Continued)
Weber County, Utah, Ogden City has adopted proceedings calling a revenue bond election to be held on February 17, 1970, limiting the right to vote to taxpayers. The plaintiff in the *Anderson* case seeks to enjoin the calling and holding of the election. The *Anderson* case has not been heard by the trial court.

[4] The text of Section 1 of Senate Bill No. 3, 1970 Regular Session Utah Legislature, as passed by the Utah Senate and the Utah House of Representatives, but as yet not signed by Governor Rampton is as follows:

> Section 1. Section 11-14-2, Utah Code Annotated 1953, as enacted by Chapter 4, Laws of Utah 1965, is amended to read:
>
> 11-14-2. The governing body of any municipality desiring to issue bonds pursuant to the authority granted in section 11-14-1 shall by resolution provide for the holding of an election therein on the question of the issuance of such bonds, and such bonds may be issued only if at such election the issuance thereof shall have been approved by a majority of such qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election, who vote on the proposition; provided, however, if the provisions of the Utah Constitution which limit the right to vote at such an election to such qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election are removed by constitutional amend-

implementation of Senate Bill No. 3 awaits the decision of this court in this cause. Efforts to solve the problems raised by the *Cipriano* case by holding two elections, one at which only taxpayers vote and one at which all qualified electors vote, are beset by concern that no authority exists under state constitutions for a legislature to authorize non-taxpayers to vote at a bond election, and secondly, whether because the taxpayers retain a veto over the issuance of the bonds even though a majority of the qualified electors voted in favor of the issuance of the bonds, the requirements of this court in "one-man, one-vote" cases such as *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964), will be violated.

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* (Continued)

ment or are held to be in violation of the Constitution of the United States by the Supreme Court of this state or of the Supreme Court of the United States and hence inapplicable to such election or if the municipality is not a county, school district, city or town which is subject to the provisions of Article XIV, Section 3, Utah Constitution and hence the limitations of such section are inapplicable to a bond election held by such a municipality, then it is the express intention of the legislature that propositions for the issuance of bonds under the Utah Municipal Bond Act shall be submitted at an election at which all qualified electors of the municipality may vote, and such bonds may be issued if the proposition is approved by a majority of those voting on the proposition who are entitled to vote at such election as provided in this section. A bond election at which all qualified electors shall be permitted to vote as provided above shall be called, held and conducted as otherwise provided in the Utah Municipal Bond Act except that the provisions and requirements of sections 11-14-5, 11-14-6 and 11-14-11 limiting the right to vote to the qualified electors of the municipality as shall have paid a property tax therein in the year

While used in some areas, because of the constitutional problems mentioned above, this approach has generally been considered to be, at most, a temporary and cumbersome solution.

Section 11-14-12, Utah Code Annotated, 1953, as amended, contains a bond election contest provision similar to that discussed and relied upon in the *Cipriano* opinion and as applied by the Louisiana Supreme Court in *Andrieux* v. *East Baton Rouge Parish School Board,* 227 So.2d 370 (Louisiana 1969).[5]

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[4] (Continued)

preceding the election or requiring proof of payment of such property tax or referring to a vote of property taxpayers shall not apply. This section does not require an election for the issuance of refunding bonds or other bonds not required by the Constitution to be voted at an election. The resolution calling the election and the election notice shall state the purpose for which the bonds are to be issued, the maximum amount of bonds to be issued, the maximum number of years from their respective dates for which such bonds may run, and the maximum rate of interest which they may bear. The purpose may be stated in general terms and need not specify the particular projects for which the bonds are to be issued or the specific amount of bond proceeds to be expended for each such project. In addition, if the municipality is an improvement district and if the bonds are to be payable in part from tax proceeds and in part from the operating revenues of the district or from any combination thereof, the resolution and notice shall so indicate, but need not specify how the bonds are to be divided as to source of payment.

[5] The bond election contest provisions, set forth in the Utah Municipal Bond Act, Section 11-14-12, Utah Code Annotated 1953, as amended, read as follows:

11-14-12. Contest of election and legality of bonds —Procedure.—The general election laws with respect

Section 11-14-19 of the Utah Code Annotated 1953, as amended, provides that all bonds not paid solely from revenues constitute full general obligations to which the full faith and credit of the municipal corporation is pledged[6]. Such bonds enjoy an obligation on the part of

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[5] (Continued)

to the contest of elections shall be applicable to bond elections. Any such contest shall be regarded as one contesting the outcome of the vote on the proposition, rather than election to office, the municipality or other entity calling the election rather than a person declared to have been elected to office, shall be regarded as the defendant, and one of the grounds of contest may be the lack of the required qualifications of voters in sufficient numbers to change the result of the bond election.

When the validity of any bond election is contested, the plaintiff or plaintiffs must, within forty days after the returns of the election are canvassed and the results thereof declared, file with the clerk of the district court of the county in which any part of the municipality or entity conducting the bond election or some part thereof is located, a verified written complaint setting forth specifically:

(1) The name of the party contesting the bond election, and that he is an elector of the municipality or entity conducting the bond election.

(2) The proposition or propositions voted on at the bond election which are contested.

(3) The particular grounds of such contest. No such contest shall be maintained and no bond election shall be set aside or held invalid unless such a complaint is filed within the period prescribed in this section.

[6] Section 11-14-19, Utah Code Annotated 1953, as amended, reads as follows:

11-14-19. General obligation bonds—Levy and collection of taxes.—Any bonds issued hereunder in such manner that they are not payable solely from revenues other than those derived from ad valorem taxes

the issuing entity to levy and collect annually ad valorem taxes without limitation as to rate or amount fully sufficient for the purpose. Under the provisions of Sections 59-10-3 and 59-10-42 Utah Code Annotated 1953, as

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* (Continued)

shall constitute full general obligations of the municipality, for the prompt and punctual payment of principal of and interest on which the full faith and credit of the municipality are pledged, and the municipality is hereby expressly required, regardless of any limitations which may otherwise exist on the amount of taxes which the municipality may levy, to provide for the levy and collection annually of ad valorem taxes without limitation as to rate or amount on all taxable property in the municipality fully sufficient for such purpose. If by law ad valorem taxes for the municipality are levied by a board other than its governing body, the taxes for which provision is herein made shall be levied by such other board and the municipality shall be under the duty in due season in each year to provide such other board with all information necessary to the levy of taxes in the required amount. Such taxes shall be levied and collected by the same officers, at the same time and in the same manner as are other taxes levied for the municipality.

If any municipality shall neglect or fail for any reason to levy or collect or cause to be levied or collected sufficient taxes for the prompt and punctual payment of such principal and interest, any person in interest may enforce levy and collection thereof in any court having jurisdiction of the subject matter, and any suit, action or proceeding brought by such person in interest shall be a preferred cause and shall be heard and disposed of without delay. All provisions of the Constitution and laws relating to the collection of county and municipal taxes and tax sales shall also apply to and regulate the collection of the taxes levied pursuant to this section, through the officer whose duty it is to collect the taxes and money due the municipality.

amended, taxes are made a lien on the property of a taxpayer, which lien may be foreclosed upon for delinquent taxes.[7]

This court in the *Cipriano* case stated that discrimination in voting qualifications at revenue bond elections based upon the taxpaying status of the voter violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Unfortunately, it is the same constitutional provision under Utah law which requires a taxpayer election for general

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[7] Sections 59-10-3 and 59-10-42, Utah Code Annotated 1953, as amended, read as follows:

59-10-3. Nature and extent of lien.—Every tax upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the 1st day in January of each year.

59-10-42. Time—Venue—Parties—Pleading.—In all cases where any county claims a lien on real estate for delinquent general taxes which have not been paid for a period of four years, such county may foreclose such lien by an action in the district court of the county in which the real estate is located. In any such action all persons owning or having or claming an interest in or lien upon the real estate or any part thereof may be joined as defendants, and the complaint shall contain a description of the land, together with the amount claimed to be due thereon, including interest, penalties and costs, and if the name of the owner of any such real estate cannot be ascertained from the records of the county, then the complaint shall state that the owner is unknown to the plaintiff. It shall be sufficient to allege in such complaint that a general tax has been duly levied upon the real estate described therein, without stating any of the proceedings or steps leading up to the levy of such tax.

obligation bonds as requires a taxpayer election for revenue bonds and hence, to the extent that it applies to revenue bonds, the taxpaying restriction of Section 3 of Article XIV of the Utah Constitution is clearly void under the *Cipriano* decision. However, Salt Lake City wishes to vote and sell general obligation bonds for airport expansion purposes, but is prevented from doing so for the reason that neither the Utah Supreme Court, nor this court, has passed on the questions of (1) whether *Cipriano* applies to general obligation bonds, and (2) whether there is authority for Salt Lake City to call an election for the issuance of general obligation bonds if the Constitution of Utah is only in part unconstitutional. Thus, Salt Lake City has no way it can hold a bond election which will not be subject to constitutional attack, under either the federal or state constitution, depending on whether or not non-taxpayers were permitted to vote at the election. This is the exact problem facing the City of Phoenix and arises from the same constitutional questions presented in this appeal.

In the *Cipriano* opinion, attention was called to the circumstances under which *arguendo* "a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election. . ." 395 U.S. at 704. In this appeal, the question is posed as to the quantum of "interest" of the taxpayers and non-taxpayers in the context of a general obligation bond issue when, under the state law, the full faith and credit of a municipal corporation is pledged to the repayment of the bonds, together with the obligation imposed by law to levy and collect sufficient ad valorem taxes, which taxes constitute a forecloseable lien on the property of the taxpayer. This is unlike a revenue bond payable solely from revenues as considered

in the *Cipriano* case, even though under Utah law no difference is recognized for purposes of the state constitutional requirement of an election on the incurring of "debt". The characterization of the differences between "general obligation" and "revenue" bonds is deceptively easy, but an analysis in terms of actual municipal finance practices becomes extremely difficult. The proposed general obligation airport bond election of Salt Lake City provides a good example of this complexity in terms of the constitutional questions now before the court in this appeal.

The city is now, and will in the future, lease airport facilities to the air carriers serving the city at rentals which will be sufficient to pay the cost of operating the airport facilities so leased and used by the carriers in providing air service to the city, and the payment of debt service on the general obligation bonds of the city issued for airport purposes. It has been the practice of the city that debt service on the outstanding general obligation airport bonds of the city is, in fact, paid for from airport revenues, although the outstanding bonds were voted and issued as general obligation bonds and the city is obligated under the terms of the authorizing ordinance to levy and collect the necessary taxes if the revenues are ever insufficient for the purpose.[8] The airport bonds which

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[8] Section 11 of Ordinance No. 8-1959 of the City of Salt Lake City, Utah, as adopted on February 11, 1959, reads as follows:

> Section 11. That from and after the delivery of any of the bonds authorized to be delivered under this ordinance and so long as any of said bonds are outstanding or unpaid either as to principal or interest, the entire gross income and revenues of Administration Building No. 2 shall be used (1) for the

the city now hopes to be able to issue will also be denominated as general obligation bonds but it is the intention of the city in fact to pay such bonds from airport revenues to the extent revenues are available. The levy of the taxes will be abated in each year in which such taxes need not be collected because of the availability of airport revenues to pay debt service. It is apparent why municipalities seek to issue bonds in such manner. Bonds payable solely from revenues must be sold at higher interest rates because of the greater risk to the investor, therefore general obligation bonds carrying a full faith and credit tax pledge are sold at an interest rate which is lower than revenue bonds would bear. This gives the investor greater protection, but as the bonds are retired from revenues from the use of the facility, the tapayers are relieved in most years of the obligation to pay taxes. This practice is quite common throughout the country in many general obligation bond issues for various facilities which generate revenues, such as airports.

What, then, are the relative "interests" which must be constitutionally protected in a voting rights case concerning a bond election? Is the possible contingent liability

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[8] (Continued)

maintenance and operation of the building, (2) for the payment of the principal of and interest on the bonds issued pursuant to this ordinance, and (3) in such other lawful manner as may be determined by the Board of Commissioners; provided, however, that nothing herein contained shall be construed as conferring contractual rights on the bondholders insofar as the application of such revenues is concerned, and provided, further, that the income and revenues derived from the operation of Administration Building No. 2 shall be collected, held and disbursed in accordance with procedures established by law governing public funds.

of the taxpayer to the collection of the tax or the foreclosure upon his property for failure to pay the tax levied to retire a bond issue, such an interest as requires that constitutionally the state may provide that only he and not the non-taxpayer elector may vote on the issuance of the bonds and hence on the question of whether or not the municipality shall acquire the project involved? Does the "interest" spoken of at great lengths in the *Kramer* and *Cipriano* opinions relate to the burdens imposed by the results of a bond election, *i.e.*, the levy and collection of the taxes, or does it relate to the interest of the voters generally in the community in the desirability or necessity for the acquisition of the facilities of the bonding program being voted upon at the election? Who is the most "interested" in the proposed Salt Lake City airport expansion? It can be suggested that most directly interested are the airline companies, non-resident travelers, resident corporations whose business will benefit from expansion of the airport, but none of whom may vote at the bond election nor whose interests would be protected by a decision of this court holding that all qualified electors may vote. Can and should the line as to the validity of election qualifications at bond elections be drawn solely on the supposed degree of "interest" of those included or excluded as a result of a taxpayer qualification, or does the logical extension of the *Kramer* and *Cipriano* cases mean that under no circumstances may a taxpayer qualification be constitutionally imposed at an election, whether held for revenue bonds, general obligation bonds, or even for special millage purposes. Many who are interested in the outcome of a bond election in only a subjective way cannot vote under Utah law, and many who are interested only in a slight degree are permitted to vote, while many would be permitted

to vote who have only slight interest if the decision of this court would mean that all qualified electors may vote. In addition, persons not now interested either in use of the airport or in the levy of taxes, may in the future become taxpayers and be subject to the levy of taxes to retire the bonds or may become users of the facilities. Are such persons who will subsequently become interested in the project, or be subject to the levy of taxes, to be disenfranchised, or in the last analysis must all qualified electors be permitted to vote at such a bond election?

All such questions are presented to the court in this appeal, and apply not only to the City of Phoenix, but to all municipal corporations in all states whose laws provide taxpaying qualifications at general obligation bond and other special purpose elections. It is imperative, therefore, that this court accept jurisdiction of this case and set the cause down for early argument.

In the few short months since June 16, 1969, many lawsuits have been started all over the country testing the application of the *Cipriano* case to various situations. As pointed out, *supra*, two of such cases are now pending in the Utah courts. In recent weeks several of these cases have been decided, demonstrating further the confusion resulting from the hiatus surrounding the lack of knowledge on the part of municipal corporations and the purchasers of municipal bonds of whether the *Cipriano* decision eliminates taxpayer qualifications at general obligation bond elections. For example, the decision of the trial court in this case is in direct conflict with the holding of the Supreme Court of the State of Idaho rendered on January 16, 1970, in *Muench* v. *Paine,* No. 10552, the text of which opinion is set forth in full as an appendix to this brief. It is submitted that the conflict among the

courts of both the federal and state judiciary is in itself a compelling argument for a prompt hearing and decision in this case.[9]

In the *Cipriano* opinion this court recognized the necessity of not giving its decision as to revenue bonds full retroactive effect. Such necessity applies equally as well to general obligation bonds as involved in this appeal. The credit of all political subdivisions would suffer if general obligation bonds previously voted under then thought to be valid state laws and sold to the investing public prior to the *Cipriano* case could now be attacked on the grounds of the invalidity of the election under the requirements of the Federal Constitution. Inasmuch as few if any bonds have been voted and fewer bonds issued in states having taxpayer qualifications as to general obligation bonds since the *Cipriano* decision, unless the court feels the necessity of uniform application of the prospective nature of its opinions as to revenue and general obligation bonds, it would seem to be desirable for any decision in this case as to general obligation bonds to be prospective from the date of the

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[9] On January 23, 1970 a three-judge court in the United States District Court for the Western District of Louisiana, Shreveport Division handed down a decision in *Hobbs* v. *Police Jury of Morehouse Parish,* Civil Action No. 14836, holding that under the prescriptive language appearing in the *Cipriano* case, the passage of the state peremptive period *after* June 16, 1969, without challenge by a non-taxpayer who is an otherwise qualified elector, bars the institution of suit attacking the validity of a general obligation bond election wherein is alleged the unconstitutionality of the Louisiana Constitution and Statutes insofar as they require a voter at an election on the issuance of general obligation bonds to be a taxpayer.

new opinion. The main reason for this is that many general obligation bond issues which were voted before June 16, 1969, where either the state contest period, such as that provided in Section 11-14-12, Utah Code Annotated, 1953, as amended, had not expired on June 16, 1969, or state law did not provide a contest period such as the court referred to in the *Cipriano* opinion, have simply not been marketable because of the constitutional questions raised in the *Cipriano* case as discussed in this brief. It has been thought that only if the state contest period had expired on June 16, 1969, would general obligation bonds be free from doubt under the ruling in the *Cipriano* case. Thus the decision of this court, making its opinion as to general obligation bonds apply only from the date of that new opinion, would then permit the successful sale of many previously voted authorizations now delayed and would permit the sale of such bonds without the additional expense of holding new elections and without incurring delays pending the time needed for state bond election laws to be brought into conformance with the requirements of the United States Constitution.

CONCLUSION

Salt Lake City, here *amicus curiae,* citing the postponement of the bonding program for its urgently needed airport expansion, the effect of such postponement on its commitments to the Federal Aviation Administration to complete the airport construction, the conflicts now existing in the reported decisions of state and federal courts as to the application of the *Cipriano* decision to general obligation bond issues, requests that this court note probable jurisdiction in this appeal, set the cause for early argument and render a decision as soon thereafter as possible.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF IDAHO

Ernst G. Muench and Lloyd Taylor, Plaintiffs, v. Marlin Pain, Archie Yamamoto, James Nafsinger, Bruce Bartlett, Leonard D. Wagers, Trustees of School District No. 139, Canyon County, Idaho; and Wilma Law, Clerk of the Board of Trustees of School District No. 139, Canyon County, Idaho, Defendants.	No. 10552 January 16, 1970

McFADDEN, *C.J.*

Both Ernst G. Muench and Lloyd Taylor, the plaintiffs in this original proceeding, are residents of School District No. 139 in Canyon County, Idaho. Plaintiff Taylor has children attending school in this district, and plaintiff Muench is a real property taxpayer in the district. They instituted this action seeking a writ of prohibition to prohibit and restrain the defendant trustees of School District No. 139 of Canyon County from selling general obligation school bonds in the amount of $805,000, after issuance of such bonds was approved in a school bond election held on May 27, 1969. An alternative writ of prohibition was issued by this court and hearing was had by this court following the filing of the defendants' return to the plaintiffs' petition.

The facts before this court are undisputed. In April 1969 the defendants as the Board of Trustees of School District No. 139 adopted a resolution calling for a bond

election at which the voters would decide whether general obligation bonds in the amount of $805,000 should be issued for the purpose of acquiring school sites and improving school facilities by building, furnishing and equipping two elementary school buildings in the district. Pursuant to I.C. § 33-404[1] the franchise in this election was limited to qualified electors of the State and residents of the district who are taxpayers (or the spouse of a taxpayer) on real property located in the district. The

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[1] I.C. § 33-404. "Qualifications of school electors.—Any person voting, or offering to vote, in any school election must be, at the time of the election:

1. An elector within the meaning of article 6, section 2 of the Constitution of the State of Idaho;
2. A resident of the district and, in the case of election of trustees, a resident of the same trustee zone as the candidate or candidates for school district trustees for whom he offers to vote;

In addition to the foregoing qualifications, a school elector must be:

a. A parent or guardian of any child or children under the age of twenty-one (21) years, when such child or children reside in the district; or
b. A taxpayer on real or personal property situate in the district, or spouse of such taxpayer;

and shall have executed, in writing and immediately before voting, a form of elector's oath attesting that he or she possesses the qualifications of a school elector prescribed by this section. The forms of electors' oaths shall be included in the records and returns of the board of election.

In any school election held on a proposal to incur, increase or assume any indebtedness, or to approve a levy for any school plant facilities reserve fund, any person voting, or offering to vote in such election shall have and possess the qualifications set forth in (1) and (2), above, and in addition thereto be a taxpayer on real property situate in the district, or the spouse of such taxpayer.

For the purpose of this section, a taxpayer on real property shall be one who pays taxes, or who is obligated as owner or contract purchaser to pay taxes, on real property."

plaintiffs maintain that a writ of prohibition should issue to prohibit the sale of these bonds, which were approved at the election by a vote of 723 to 297, on the ground that the election was invalid in that I.C. § 33-404 in limiting the franchise to voters in the district who were real property taxpayers is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and in violation of Sections 2, 3 and 20 of Article 1 of the Constitution of this state.[2] In support of their position, plaintiffs cite *Kramer v. Union Free School Dist.*, ... U.S. ....., 23 L.Ed.2d 583, 89 S. Ct. 1886 (1969) and *Cipriano* v. *City of Houma*, ... U.S. ....., 23 L.Ed.2d 647, 89 S. Ct. 1897 (1969).

At the outset a question is presented whether a petition for a writ of prohibition is the proper procedure for bringing this case before the court. I.C. § 7-401 provides that a writ of prohibition can issue only to arrest "the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board

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[2] Art. 1 § 2. "Political power inherent in the people.—All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature."

Art. 1, § 3. "State inseparable part of Union.—The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Art. 1, § 20. "No property qualification required of electors—Exceptions.—No property qualifications shall ever be required for any person to vote or hold office except in school elections, or elections creating indebtedness, or in irrigation district elections as to which last-named elections the legislature may restrict the voters to land owners."

or person." Moreover, such writ is not available unless there is no plain, speedy and adequate remedy in the ordinary course of law. *Clearwater Timber Protective Ass'n* v. *District Court,* 84 Idaho 129, 369 P.2d 571 (1962). In a proper case this court has the authority to issue a writ of prohibition. Art. 5, § 9, Idaho Const.; I.C. § 1-203.

In *Baker* v. *Gooding County,* 25 Idaho 506, 138 Pac. 342 (1914), this court held that a writ of prohibition would lie to restrain county commissioners from selling bonds when it appeared that the resolution for submitting the bond issue to the electorate had not been properly passed. Under such circumstances, this court held, the commissioners were acting in excess of their jurisdiction. The issue before the court is of such great public interest affecting the validity of existing bond issues and the rights of the several school districts of this state (as well as other taxing authorities of this state) that a decision on the issues is deemed essential in the interests of the welfare of this state. See *Rich* v. *Williams,* 81 Idaho 311, 341 P.2d 432 (1959); *White* v. *Young,* 88 Idaho 188, 397 P.2d 756 (1964). It is the conclusion of the court that the petition for a writ of prohibition is the proper procedure for challenging the validity of the particular bond election in question.

The defendants, by their return to the petition, allege that the election involved in this action was held May 27, 1969 and that the trustees of the district canvassed the results of the election the same day. They further allege that the petition herein was filed on September 14, 1969, and then contend that by reason of the provisions of S.L. 1969, Ch. 208, now I.C. § 34-2001A, that the instant action was not timely brought. Some doubt is entertained by the court as to the applicability of that act to the instant case. In particular there is a question as to whether this original proceeding challenging the constitutionality of I.C. § 34-404 is within the scope of I.C. § 34-2001A. See *Kramer* v. *Union Free School Dist.,*

supra, and *Cipriano* v. *City of Houma,* supra. However, the defendants expressed to the court in argument that they waive this forty day time limitation as a defense to this action.

This court is aware of the crises facing so many of the school districts in this state as expressed by counsel and by the amicus curiae in their respective briefs. The school districts are under constant pressure for additional facilities by way of new building, new classrooms and the necessary equipment for such new construction, the need for which is created by the continual increase in the number of children reaching school age. The school districts in the state can meet the demands for such new construction only by raising the funds from the sale of bonds which have been authorized at an election following regular proceedings to present the issue. We also recognize the fact that at present the bond issues of this state that have been approved are not saleable in the open market. Because of these urgent problems facing the school districts of the state, and because of the great public interest in the result of this litigation[3] it is the conclusion of this court that the waiver by the defendants of the defense alleged in their answer that the cause is barred by the time provisions of I.C. § 34-2001A, will be accepted and redetermination of such issues reserved for a future case. *Branson* v. *Firemen's Retirement Fund,* 79 Idaho 167, 312 P.2d 1037 (1957); *Rivera* v. *Johnston,* 71 Idaho 70, 225 P.2d 858 (1951); *Frisbie* v. *Sunshine Mining Co.,* 93 Idaho ....., 457 P.2d 408 (1969).

We come then to the central issue of whether the statutes of this state, and in particular I.C. § 33-404 (supra, note 1), restricting the franchise in school bond elections to real property taxpayers and their spouses is unconstitutional. The plaintiffs do not challenge that portion of I.C. § 33-404 which requires that a voter be

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[3] See *Rich* v. *Williams,* 81 Idaho 311, 341 P.2d 432 (1959); *White* v. *Young,* 88 Idaho 138, 397 P.2d 756 (1964).

an elector under the provisions of Idaho Const. Art 6, § 2 and a resident of a school district. They do, however, challenge that portion of the statute requiring that a voter in a "school election" be the parent or guardian of a child under twenty-one years of age or a taxpayer on real or personal property located in the district and that portion which requires a voter in a "school election held on a proposal to incur, * * * any indebtedness" to be a taxpayer, or spouse of a taxpayer, on real property.

I.C. § 33-404 sets out qualifications for voting in two distinct types of elections: i.e. "school elections" and "school elections held on a proposal to incur indebtedness." The parental and real or personal property taxpayer qualifications are applicable only to the former and are not involved here. However, in view of *Kramer* v. *Union Free School Dist.*, supra, such qualifications are unconstitutional when applied to school elections. We are concerned solely with the validity of the real property taxpayer requirement in a "school election held on a proposal to incur * * * any indebtedness."

It has long been settled that the United States Constitution leaves establishment of voter qualifications to the individual states. United States Constitution, Art. 1, § 2; *Lassiter v. Northampton County Election Board*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). Only when these qualifications result in an invidious discrimination are they in violation of the equal protection clause of the United States Constitution. See *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed2d 169 (1966).

The discrimination between property owners and non-property owners in elections to create indebtedness was authorized in Idaho since adoption of its constitution in 1890. Idaho Const. Art. 1, § 20; *Wiggin* v. *City of Lewiston*, 8 Idaho 527, 69 Pac. 286 (1902); *Hartman* v. *Meier*, 39 Idaho 261, 227 Pac. 25 (1924). See also *Bissett* v. *Pioneer Irrigation Dist.*, 21 Idaho 98, 120 Pac. 461 (1912); *Carville* v. *McBride*, 202 Pac. 802 (Nev. 1922). The

plaintiffs, however, contend that the existing Idaho Constitutional provision, statutory law, and decisions of this court have been rendered unconstitutional by the United States Supreme Court in *Kramer* v. *Union Free School Dist.*, ... U.S. ....., 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969); and *Cipriano* v. *City of Houma*, ... U.S. ....., 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969).

The defendants contend that *Kramer* v. *Union Free School Dist.*, supra, and *Cipriano* v. *City of Houma*, supra, are inapplicable to the present case. They seek to distinguish these cases on the ground that the former involved a "political" election in that an election of representatives on the school board was involved and that the latter involved revenue bonds rather than general obligation bonds as in the present case. It is our opinion, however, that the rationale developed in *Kramer* v. *Union Free School Dist.*, supra, for determining whether a voting statute violates the Equal Protection Clause is not restricted to "political" elections, but rather is applicable to all types of elections. The court in that case stated that

> "Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." at 89 S.Ct. 1891.

Also, the fact that the *Kramer* rationale was applied in the *Cipriano* decision indicates that it is not restricted to strictly "political" elections.

Neither *Kramer* v. *Union Free School Dist.*, supra, nor *Cipriano* v. *City of Houma*, supra, controls the present case however. Neither case holds that discrimination between property owners and non-property owners in a voting statute is per se a violation of the Equal Protection Clause. On the contrary, the court in each case assumed that in certain elections the franchise might be limited to a particular group or class of citizens. In *Kramer* v. *Union Free School Dist.*, supra, the court stated that

> "We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those 'primarily interested' or 'primarily affected.' Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited." 89 S.Ct. at 1892.

Similarly the court stated in *Cipriano* v. *City of Houma*, supra.

> "Assuming *arguendo* that a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election, whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on [quoting from *Kramer* v. *Union Free School Dist.*] 'whether all those excluded are in fact substantially less interested or affected than those the statute includes.'" 89 S.Ct. at 1899-1900.

The court noted, however, that for a limitation in the franchise to be constitutionally approved, it must be necessary to achieve a compelling state interest and that the statute must be so tailored so that all of those excluded are substantially less interested or affected than all of those included. The distinction between *Kramer* v. *Union Free School Dist.*, supra, and the present case lies in the fact that in *Kramer* the election was, at least in part, for the purpose of selecting representatives to serve on the school board. The court reasoned in that case that issues of general school policy were involved, issues in which every resident of the district, parent and non-parent, property owner and non-property owner alike, had a common interest. The court thus concluded that Kramer was not substantially less interested in or affected by the election than other persons allowed to vote and that the statute therefore invidiously discriminated against him in violation of the Equal Protection Clause.

Cipriano v. *City of Houma,* supra, is also distinguishable from the present case in that *Cipriano* involved the sale of revenue bonds rather than general obligation bonds. Revenue bonds differ from general obligation bonds in that the former are paid out of revenue generated by the utility which they finance; they are not financed by property tax revenue. In holding the statute restricting the franchise to real property taxpayers unconstitutional in *Cipriano* v. *City of Houma,* supra, the court was careful to note that

> "Of course, the operation of the utility systems—gas, water, and electric—affects virtually every resident of the city, nonproperty owners as well as property owners. All users pay utility bills, and the rates may be affected substantially by the amount of revenue bonds outstanding. Certainly property owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates.
>
> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." 89 S.Ct. at 1900.

The key distinction between *Kramer* v. *Union Free School Dist.,* supra, and *Cipriano* v. *City of Houma,* supra, and the present case, then, is that in *Kramer* and *Cipriano* the court was unable to say that the excluded class of voters was substantially less interested in or affected by the election than was the included class. The United States Supreme Court did not hold in either *Kramer* v. *Union Free School Dist.,* supra, or *Cipriano* v. *City of Houma,* supra, that there was not a compelling state interest in limiting the franchise in special elections to

those persons more interested in and more substantially affected by the outcome of the election than the excluded class of voters, but, at most only held that in those cases the excluded class was as substantially affected by the election as the included class.

This court in *Hartman* v. *Meier*, 39 Idaho 261, 227 Pac. 25 (1924), quoted with approval from the memorandum opinion of the trial court in that case as follows:

> "What, then, is the purpose of the legislature in requiring that electors at bond elections must possess the added qualifications of being 'taxpayers of the municipality'? The mere ownership of property has long since ceased to be considered as a proper element in determining the general right of suffrage; a property owner is no more competent to judge of the suitability of a candidate for office or the advisability of a public improvement than any other person. Obviously the purpose of this act was to restrict the issuance of bonds to such issues as should be consented to by at least two-thirds of those who were to be primarily affected by the burden thereby imposed. Any other purpose would be unreasonable and absurd. Unless the ownership of property be considered only with reference to the burden imposed by the result of the election, it should not be considered at all. The legislature in adding this qualification must have intended to require the submission of the question to those who would be peculiarly affected by the result of the election. An automobile owner who pays his registration fee is not so affected; the issuance of the bonds neither increases nor diminishes the amount of his license fee, and his automobile is not otherwise taxed. Nor is his privilege fee within the commonly accepted meaning of the word 'tax,' nor is he a taxpayer in the commonly accepted meaning, as held in the decisions above mentioned."

Under the statutes of Idaho pertaining to school bonds, in Chapter 11, Title 33, Idaho Code, bonds are to be

issued upon an amortization plan (I.C. § 33-1107) "and the various annual maturities of any issue of bonds shall as nearly as practicable be in such principal amounts as will, together with accruing interest on all outstanding bonds of such issue, be met and paid by an equal annual tax levy during the term for which such bonds shall be issued." I.C. § 33-801 requires the tax levies be set by the school trustees, and I.C. § 33-802 provides that any tax levied for school purposes shall be a lien on the property against which the tax is levied, including the levies required to satisfy all maturing bonds, and bond interest. In the event of a failure of the trustees to certify such levy to the board of county commissioners, the board of county commissioners is required to set a levy sufficient to meet all accruing bond and bond interest charges for the year. I.C. § 33-1115 provides "The faith of each district is solemnly pledged for the payment of interest and redemption of principal on all bonds lawfully and validly issued."

Under I.C. § 63-101, "All property within the jurisdiction of this state, not expressly exempted, is subject to assessment and taxation." After January 1, 1970, all taxes levied upon both personal property and real estate are a lien upon such real estate, (I.C. § 63-102—104). When a bond issue which is payable from the taxes levied on the property of the district is authorized by a school district, it may be for a term of as many as twenty years (I.C. § 33-1107). The total amount of bonds that may be issued by the school district is limited by a percentage of the assessed valuation.

It is apparent that the real property taxpayers have an interest in the outcome of school district bond elections substantially greater than other electors who are not also taxpayers on real property. The owners of the real property in the district are faced with the additional tax burden for the number of years authorized by the bond issue; they are subject to having a lien placed on their real property which continues year by year for the

life of the bond issue. Electors, who neither own nor pay taxes on real property do not have this real and substantial interest. It is recognized that both non-real property taxpayers and real property taxpayers may have a vital interest in the outcome of any bond election within the school district by reason of the improvements that passage of such election would allow, but the improvements within the school district that are to be made also carry the responsibility for the payment for these improvements, which responsibility under the law falls primarily on the real property taxpayer of the district.

In the present case it is our opinion that nonproperty owners as a class are substantially less affected by the outcome of a general obligation bond election than are property owners. Although nonproperty owners might feel the financial impact of a bond issue indirectly through increased rentals and prices in the economy and might have children attending the public schools, the effect of a bond issue upon the real property owner is to impose a lien upon his property for payment of the bonds. I.C. § 33-802. The court in *Cipriano* v. *City of Houma,* supra, explicitly recognized the greater interest which this lien gives to the real property owner when it noted that the bonds there were not to be paid from revenue derived from real property taxation.

Since it is our opinion that neither *Kramer* v. *Union Free School Dist.,* supra, nor *Cipriano* v. *City of Houma,* supra, prohibits discrimination between nonproperty owners and property owners in a general obligation bond election, we are reluctant to depart from the well settled Idaho law which has always upheld this distinction. See *Wiggin* v. *City of Lewiston,* 8 Idaho 527, 69 Pac. 286 (1902); *Hartman* v. *Meier,* 39 Idaho 261, 227 Pac. 25 (1924). Accordingly the alternative writ is quashed, writ of prohibition is denied and petition dismissed.

Costs to defendants.

DONALDSON, SHEPARD and SPEAR, *JJ.*, concur.

McQUADE, *J.*, dissenting.

I.C. § 34-2001A (S.L. 1969, Chapter 208, Section 2, approved March 21, 1969) reads in pertinent part as follows:

> "B. When the validity of any bond election is contested upon any of the grounds enumerated in section 34-2001 or upon any other grounds whatsoever the plaintiff or plaintiffs must, within forty (40) days after the votes are canvassed and the results thereof declared, file in the proper court a verified written complaint setting forth, in addition to the other requirements of this chapter, the following:
>
> (1) The name of the party contesting the bond election, and that he is an elector of the public entity conducting the bond election.
>
> (2) The proposition or propositions voted on at the election which are contested.
>
> (3) The particular grounds of such contest.
>
> "C. No such election contest shall be maintained and no bond election shall be set aside or held invalid unless a complaint is filed as permitted hereunder within the period prescribed in this section. As to bond elections which have been held prior to the effective date [March 21, 1969] of this act, no such contest shall be maintained wherein it is alleged that the bond election should be set aside or held on any ground enumerated in section 34-2001 or on any other ground, unless such bond election contest be filed as herein provided within forty (40) days from and after the effective date of this act."

This statute is clear and without exception. There is nothing in the section which even suggests that it does not now apply. Because the plaintiffs' petition was not filed within forty days after the election was held, the votes "canvassed, and the results thereof declared," we should dismiss this action. It was not timely brought because it was barred by I.C. § 34-2001A.

The majority, understandably anxious to reach the important constitutional issue raised in this case, has held that the defendants "waived" I.C. § 34-2001A. Such waiver is not lawful. The defendants can not waive the bar of I.C. § 34-2001A. As was said by the Supreme Court of Arizona in the case of *City of Glendale* v. *Coquat,* 52 P.2d 1178, 1180 (1935),

> "It is apparently universally held that where a right has been given to an individual not alone for his private benefit but, as a matter of public policy, in the interest of the state, it may not be waived by any one. Day v. McAllister, 15 Gray (Mass.) 433; Clark v. Spencer, 14 Kan. 398, 19 Am.Rep. 96; State v. Carman, 63 Iowa 130, 18 N.W. 691, 50 Am.Rep. 741; Recht v. Kelly, 82 Ill. 147, 25 Am.Rep. 301; Bosler v. Rheem, 72 Pa. 54; Branch v. Tomlinson, 77 N.C. 388; Clark v. State, 142 N.Y. 101, 36 N.E. 817; Larsen v. Rice, 100 Wash. 642, 171 P. 1037; Cata v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203, 41 A.L.R. 439. As was said by the New York Court of Appeals, in Wright v. State, 223 N.Y. 44, 119 N.E. 83, 85, 'Such conclusion would permit an officer of the state to defeat the beneficent purpose of the statute and violate its provisions.'"

Buyers of Idaho bonds forty days after an election must be secure in the knowledge that their investment will not be jeopardized by a legal action contesting that election. By allowing these defendants to waive I.C. § 34-2001A, this Court has thrown open to challenge every bond election in the past or in the future of this state.

A valid "waiver" necessarily involves a choice to give up a right personal to the party doing the waiving. In order for a "waiver" to be permissible in this case a representative of the purchasers of the bonds, issued as a result of the election which is challenged in this action, would have to be a party. There is no such representative before us. The record provides no indication that the

defendants have been authorized to make a waiver under I.C. § 34-2001A for those bondholders. The defendants' attempt to waive the provisions of the statute should be given no effect. This action was not timely brought.

I respectfully dissent from the opinion of the majority.

CERTIFICATE

I, the undersigned counsel for Amicus Curiae, Salt Lake City, Utah, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this 6th day of February, 1970

Phillip N. Hahn

SUPREME COURT, U. S.

FEB 12 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF THE STATE OF IDAHO, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

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IN THE

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Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Appellants point out in their Jurisdictional Statement that the decision in this case is in direct conflict with the decision of the Fifteenth Judicial District Court of Louisiana. In their Supplemental Brief, appellants inform this Court that, in addition to the conflict of decisions in those Courts, there also exists a direct conflict between the decision in this case and two decisions handed down by the Supreme Court of the State of Oklahoma on substantially the same issue.

We wish to inform this Court that the Supreme Court of the State of Idaho handed down a decision on the same issue on January 16, 1970, which is also in direct conflict with the decision in this case. That opinion is set out as Appendix "A".

Because the substantiality of the federal question in this case is borne out by the conflict between the holding of the lower Court and the holding of the Supreme Court of the State of Idaho, we respectfully urge this Court to note probable jurisdiction and resolve the conflict so detrimental to local units of government.

Respectfully submitted,

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APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF IDAHO

No. 10552

ERNEST G. MUENCH and LLOYD TAYLOR,
Plaintiffs,

—*v.*—

MARLIN PAINE, ARCHIE YAMAMOTO, JAMES NAFSINGER, BRUCE BARTLETT, LEONARD D. WAGERS, Trustees of School District No. 139, Canyon County, Idaho; and WILMA LAW, Clerk of the Board of Trustees of School District No. 139, Canyon County, Idaho,
Defendants.

Boise, November 1969 Term
Filed: January 16, 1970
Martin V. Huff, Clerk

Original proceedings for writ of prohibition to restrain sale of general obligation bonds of school district. Alternative writ of prohibition quashed and writ denied, and petition dismissed.

Weeks & Davis, Nampa, for plaintiffs.

Smith, Miller & Weston, Caldwell, for defendants.

Robert M. Robson, Attorney General, and James R. Hargis, Assistant Attorney General,

Boise, amicus curiae; and Cecil D. Hobdey, of James, Hobdey and Shaw, Gooding, amicus curiae.

McFADDEN, C.J.

Both Ernst G. Muench and Lloyd Taylor, the plaintiffs in this original proceeding are residents of School District No. 139 in Canyon County, Idaho. Plaintiff Taylor has children attending school in this district, and plaintiff Muench is a real property taxpayer in the district. They instituted this action seeking a writ of prohibition to prohibit and restrain the defendant trustees of School District No. 139 of Canyon County from selling general obligation school bonds in the amount of $805,000, after issuance of such bonds was approved in a school bond election held on May 27, 1969. An alternative writ of prohibition was issued by this court and hearing was had by this court following the filing of the defendants' return to the plaintiffs' petition.

The facts before this court are undisputed. In April 1969 the defendants as the Board of Trustees of School District No. 139 adopted a resolution calling for a bond election at which the voters would decide whether general obligation bonds in the amount of $805,000 should be issued for the purpose of acquiring school sites and improving school facilities by building, furnishing and equipping two elementary school buildings in the district. Pursuant

to I.C. § 33-404[1] the franchise in this election was limited to qualified electors of the State and residents of the district who are taxpayers (or the spouse of a taxpayer) on real property located in the district. The plaintiffs maintain that a writ of prohibition should issue to prohibit the sale of these bonds, which were approved at the election by a vote of 723 to 297, on the ground that the election was invalid in that I.C. § 33-404 in limiting the fran-

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1/ I.C. § 33-404. "Qualifications of school electors. — Any person voting, or offering to vote, in any school election must be, at the time of the election:

1. An elector within the meaning of article 6, section 2 of the Constitution of the State of Idaho;
2. A resident of the district and, in the case of election of trustees, a resident of the same trustee zone as the candidate or candidates for school district trustees for whom he offers to vote;

In addition to the foregoing qualifications, a school elector must be:

a. A parent or guardian of any child or children under the age of twenty-one (21) years, when such child or children reside in the district; or

b. A taxpayer on real or personal property situate in the district, or spouse of such taxpayer;

and shall have executed, in writing and immediately before voting, a form of elector's oath attesting that he or she possesses the qualifications of a school elector prescribed by this section. The forms of electors' oaths shall be included in the records and returns of the board of election.

In any school election held on a proposal to incur, increase or assume any indebtedness, or to approve a levy for any school plant facilities reserve fund, any person voting, or offering to vote in such election shall have and possess the qualifications set forth in (1) and (2), above, and in addition thereto be a taxpayer on real property situate in the district, or the spouse of such taxpayer.

For the purpose of this section, a taxpayer on real property shall be one who pays taxes, or who is obligated as owner or contract purchaser to pay taxes, on real property."

chise to voters in the district who were real property taxpayers is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and in violation of Sections 2, 3 and 20 of Article 1 of the Constitution of this state.[2] In support of their position, plaintiffs cite Kramer v. Union Free School Dist., ___ U.S. ___, 23 L.Ed.2d 583, 89 S. Ct. 1886 (1969) and Cipriano v. City of Houma, ___ U.S. ___, 23 L.Ed.2d 647, 89 S. Ct. 1897 (1969).

At the outset a question is presented whether a petition for a writ of prohibition is the proper procedure for bringing this case before the court. I.C. § 7-401 provides that a writ of prohibition can issue only to arrest "the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Moreover,

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2/ Art. 1 § 2. "Political power inherent in the people. — All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature."

Art. 1, § 3. "State inseparable part of Union. — The State of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Art. 1, § 20. "No property qualification required of electors—Exceptions. — No property qualifications shall ever be required for any person to vote or hold office except in school elections, or elections creating indebtedness, or in irrigation district elections as to which last-named elections the legislature may restrict the voters to land owners."

such writ is not available unless there is no plain, speedy and adequate remedy in the ordinary course of law. Clearwater Timber Protective Ass'n v. District Court, 84 Idaho 129, 369 P.2d 571 (1962). In a proper case this court has the authority to issue a writ of prohibition. Art. 5, § 9, Idaho Const.; I.C. § 1-203.

In Baker v. Gooding County, 25 Idaho 506, 138 Pac. 342 (1914), this court held that a writ of prohibition would lie to restrain county commissioners from selling bonds when it appeared that the resolution for submitting the bond issue to the electorate had not been properly passed. Under such circumstances, this court held, the commissioners were acting in excess of their jurisdiction. The issue before the court is of such great public interest affecting the validity of existing bond issues and the rights of the several school districts of this state (as well as other taxing authorities of this state) that a decision on the issues is deemed essential in the interests of the welfare of this state. See Rich v. Williams, 81 Idaho 311; 341 P.2d 432 (1959); White v. Young, 88 Idaho 188, 397 P.2d 756 (1964). It is the conclusion of the court that the petition for a writ of prohibition is the proper procedure for challenging the validity of the particular bond election in question.

The defendants, by their return to the petition, allege that the election involved in this action was

held May 27, 1969, and that the trustees of the district canvassed the results of the election the same day. They further allege that the petition herein was filed on September 14, 1969, and then contend that by reason of the provisions of S.L. 1969, Ch. 208, now I.C. § 34-2001A, that the instant action was not timely brought. Some doubt is entertained by the court as to the applicability of that act to the instant case. In particular there is a question as to whether this original proceeding challenging the constitutionality of I.C. § 34-404 is within the scope of I.C. § 34-2001A. See Kramer v. Union Free School Dist., supra, and Cipriano v. City of Houma, supra. However, the defendants expressed to the court in argument that they waive this forty day time limitation as a defense to this action.

This court is aware of the crises facing so many of the school districts in this state as expressed by counsel and by the amicus curiae in their respective briefs. The school districts are under constant pressure for additional facilities by way of new buildings, new classrooms and the necessary equipment for such new construction, the need for which is created by the continual increase in the number of children reaching school age. The school districts in the state can meet the demands for such new construction only be raising the funds from the sale of bonds which have been authorized at an election following regular proceedings to present the issue.

We also recognize the fact that at present the bond issues of this state that have been approved are not saleable in the open market. Because of these urgent problems facing the school districts of the state, and because of the great public interest in the result of this litigation[3] it is the conclusion of this court that the waiver by the defendants of the defense alleged in their answer that the cause is barred by the time provisions of I.C. § 34-2001A, will be accepted and redetermination of such issues reserved for a future case. Branson v. Firemen's Retirement Fund, 79 Idaho 167, 312 P.2d 1037 (1957); Rivera v. Johnston, 71 Idaho 70, 225 P.2d 858 (1951); Frisbie v. Sunshine Mining Co., 93 Idaho ___, 457 P.2d 408 (1969).

We come than to the central issue of whether the statutes of this state, and in particular I.C. § 33-404 (supra, note 1), restricting the franchise in school bond elections to real property taxpayers and their spouses is unconstitutional. The plaintiffs do not challenge that portion of I.C. § 33-404 which requires that a voter be an elector under the provisions of Idaho Const. Art 6, § 2 and a resident of a school district. They do, however, challenge that portion of the statute requiring that a voter in a "school election" be the parent or guardian of a child under twenty-one years of age or a taxpayer on real or

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3/ See Rich v. Williams, 81 Idaho 311, 341 P. 2d 432 (1959); White v. Young, 88 Idaho 138, 397 P. 2d 756 (1964).

personal property located in the district and that portion which requires a voter in a "school election held on a proposal to incur, * * * any indebtedness" to be a taxpayer, or spouse of a taxpayer, on real property.

I.C. § 33-404 sets out qualifications for voting in two distinct types of elections: i.e. "school elections" and "school elections held on a proposal to incur indebtedness." The parental and real or personal property taxpayer qualifications are applicable only to the former and are not involved here. However, in view of Kramer v. Union Free School Dist., supra, such qualifications are unconstitutional when applied to school elections. We are concerned solely with the validity of the real property taxpayer requirement in a "school election held on a proposal to incur * * * any indebtedness."

It has long been settled that the United States Constitution leaves establishment of voter qualifications to the individual states. United States Constitution, Art. 1, § 2; Lassiter v. Northampton County Election Board, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). Only when these qualifications result in an invidious discrimination are they in violation of the equal protection clause of the United States Constitution. See Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed2d 169 (1966).

The discrimination between property owners and nonproperty owners in elections to create indebtedness was authorized in Idaho since adoption of its constitution in 1890. Idaho Const. Art. 1, § 20; Wiggin v. City of Lewiston, 8 Idaho 527, 69 Pac. 286 (1902); Hartman v. Meier, 39 Idaho 261, 227 Pac. 25 (1924). See also Bissett v. Pioneer Irrigation Dist., 21 Idaho 98, 120 Pac. 461 (1912): Carville v. McBride, 202 Pac. 802 (Nev. 1922). The plaintiffs, however, contend that the existing Idaho Constitutional provision, statutory law, and decisions of this court have been rendered unconstitutional by the United States Supreme Court in Kramer v. Union Free School Dist., ___U.S.___, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969); and Cipriano v. City of Houma, ___U.S.___, 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969).

The defendants contend that Kramer v. Union Free School Dist., supra, and Cipriano v. City of Houma, supra, are inapplicable to the present case. They seek to distinguish these cases on the ground that the former involved a "political" election in that an election of representatives on the school board was involved and that the latter involved revenue bonds rather than general obligation bonds as in the present case. It is our opinion, however, that the rationale developed in Kramer v. Union Free School Dist., supra, for determining whether a voting statute violates the Equal Protection Clause

is not restricted to "political" elections, but rather is applicable to all types of elections. The court in that case stated that

> "Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." at 89 S.Ct. 1891.

Also, the fact that the Kramer rationale was applied in the Cipriano decision indicates that it is not restricted to strictly "political" elections.

Neither Kramer v. Union Free School Dist., supra, nor Cipriano v. City of Houma, supra, controls the present case however. Neither case holds that discrimination between property owners and non-property owners in a voting statute is per se a violation of the Equal Protection Clause. On the contrary, the court in each case assumed that in certain elections the franchise might be limited to a particular group or class of citizens. In Kramer v. Union Free School Dist., supra, the court stated that

> "We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those 'primarily interested' or 'primarily affected.' Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited."
> 89 S.Ct. at 1892.

Similarly the court stated in Cipriano v. City of Houma, supra.

> "Assuming *arguendo* that a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election, whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on (quoting from Kramer v. Union Free School Dist.) 'whether all those excluded are in fact substantially less interested or affected than those the statute includes.' " 89 S.Ct. at 1899-1900.

The court noted, however, that for a limitation in the franchise to be constitutionally approved, it must be necessary to achieve a compelling state interest and that the statute must be so tailored so that all of those excluded are substantially less interested or affected than all of those included. The distinction between Kramer v. Union Free School Dist., supra, and the present case lies in the fact that in Kramer the election was, at least in part, for the purpose of selecting representatives to serve on the school board. The court reasoned in that case that issues of general school policy were involved, issues in which every resident of the district, parent and non-parent, property owner and non-property owner alike, had a common interest. The court thus concluded that

Kramer was not substantially less interested in or affected by the election than other persons allowed to vote and that the statute therefore invidiously discriminated against him in violation of the Equal Protection Clause.

Cipriano v. City of Houma, supra, is also distinguishable from the present case in that Cipriano involved the sale of revenue bonds rather than general obligation bonds. Revenue bonds differ from general obligation bonds in that the former are paid out of revenue generated by the utility which they finance; they are not financed by property tax revenue. In holding the statute restricting the franchise to real property taxpayers unconstitutional in Cipriano v. City of Houma, supra, the court was careful to note that

> "Of course, the operation of the utility systems — gas, water, and electric — affects virtually every resident of the city, nonproperty owners as well as property owners. All users pay utility bills, and the rates may be affected substantially by the amount of revenue bonds outstanding. Certainly property owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates.
>
> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue.

> Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." 89 S.Ct. at 1900.

The key distinction between Kramer v. Union Free School Dist., supra, and Cipriano v. City of Houma, supra, and the present case, then, is that in Kramer and Cipriano the court was unable to say that the excluded class of voters was substantially less interested in or affected by the election than was the included class. The United States Supreme Court did not hold in either Kramer v. Union Free School Dist., supra, or Cipriano v. City of Houma, supra, that there was not a compelling state interest in limiting the franchise in special elections to those persons more interested in and more substantially affected by the outcome of the election than the excluded class of voters, but, at most, only held that in those cases the excluded class was as substantially affected by the election as the included class.

This court in Hartman v. Meier, 39 Idaho 261, 227 Pac. 25 (1924), quoted with approval from the memorandum opinion of the trial court in that case as follows:

> "What, then, is the purpose of the legislature in requiring that electors at bond elections must

possess the added qualifications of being 'taxpayers of the municipality'? The mere ownership of property has long since ceased to be considered as a proper element in determining the general right of suffrage; a property owner is no more competent to judge of the suitability of a candidate for office or the advisability of a public improvement than any other person. Obviously the purpose of this act was to restrict the issuance of bonds to such issues as should be consented to by at least two-thirds of those who were to be primarily affected by the burden thereby imposed. Any other purpose would be unreasonable and absurd. Unless the ownership of property be considered only with reference to the burden imposed by the result of the election, it should not be considered at all. The legislature in adding this qualification must have intended to require the submission of the question to those who would be peculiarly affected by the result of the election. An automobile owner who pays his registration fee is not so affected; the issuance of the bonds neither increases nor diminishes the amount of his license fee, and his automobile is not otherwise taxed. Nor is his privilege fee within the commonly accepted meaning of the word 'tax,' nor is he a taxpayer in the commonly accepted meaning, as held in the decisions above mentioned."

Under the statutes of Idaho pertaining to school bonds, in Chapter 11, Title 33, Idaho Code, bonds are to be issued upon an amortization plan (I.C. § 33-1107) "and the various annual maturities of any issue of bonds shall as nearly as practicable be in such principal amounts as will, together with accruing interest on all outstanding bonds of such issue, be met and paid by an equal annual tax levy during the term for which such bonds shall be issued." I.C. § 33-801 requires the tax levies be set by the school trustees, and I.C. § 33-802 provides that any tax levied for school purposes shall be a lien on the property against which the tax is levied, including the levies required to satisfy all maturing bonds, and bond interest. In the event of a failure of the trustees to certify such levy to the board of county commissioners, the board of county commissioners is required to set a levy sufficient to meet all accruing bond and bond interest charges for the year. I.C. § 33-1115 provides "The faith of each district is solemnly pledged for the payment of interest and redemption of principal on all bonds lawfully and validly issued."

Under I.C. § 63-101, "All property within the jurisdiction of this state, not expressly exempted, is subject to assessment and taxation." After January 1, 1970, all taxes levied upon both personal property and real estate are a lien upon such real estate, (I.C. § 63-102—104). When a bond issue which is pay-

able from the taxes levied on the property of the district is authorized by a school district, it may be for a term of as many as twenty years (I.C. § 33-1107). The total amount of bonds that may be issued by the school district is limited by a percentage of the assessed valuation.

It is apparent that the real property taxpayers have an interest in the outcome of school district bond elections substantially greater than other electors who are not also taxpayers on real property. The owners of the real property in the district are faced with the additional tax burden for the number of years authorized by the bond issue; they are subject to having a lien placed on their real property which continues year by year for the life of the bond issue. Electors, who neither own nor pay taxes on real property do not have this real and substantial interest. It is recognized that both non-real property taxpayers and real property taxpayers may have a vital interest in the outcome of any bond election within the school district by reason of the improvements that passage of such election would allow, but the improvements within the school district that are to be made also carry the responsibility for the payment for these improvements, which responsibility under the law falls primarily on the real property taxpayer of the district.

In the present case it is our opinion that nonproperty owners as a class are substantially less affected

by the outcome of a general obligation bond election than are property owners. Although nonproperty owners might feel the financial impact of a bond issue indirectly through increased rentals and prices in the economy and might have children attending the public schools, the effect of a bond issue upon the real property owner is to impose a lien upon his property for payment of the bonds. I.C. § 33-802. The court in Cipriano v. City of Houma, supra, explicitly recognized the greater interest which this lien gives to the real property owner when it noted that the bonds there were not to be paid from revenue derived from real property taxation.

Since it is our opinion that neither Kramer v. Union Free School Dist., supra, nor Cipriano v. City of Houma, supra, prohibits discrimination between nonproperty owners and property owners in a general obligation bond election, we are reluctant to depart from the well settled Idaho law which has always upheld this distinction. See Wiggin v. City of Lewiston, 8 Idaho 527, 69 Pac. 286 (1902); Hartman v. Meier, 39 Idaho 261, 227 Pac. 25 (1924). Accordingly the alternative writ is quashed, writ of prohibition is denied and petition dismissed.

Costs to defendants.

DONALDSON, SHEPARD and SPEAR, JJ., concur.

McQUADE, J., dissenting.

I.C. § 34-2001A. (S.L. 1969, Chapter 208, Section 2, approved March 21, 1969) reads in pertinent part as follows:

"B. When the validity of any bond election is contested upon any of the grounds enumerated in section 34-2001 or upon any other grounds whatsoever the plaintiff or plaintiffs must, within forty (40) days after the votes are canvassed and the results thereof declared, file in the proper court a verified written complaint setting forth, in addition to the other requirements of this chapter, the following:

(1) The name of the party contesting the bond election, and that he is an elector of the public entity conducting the bond election.

(2) The proposition or propositions voted on at the election which are contested.

(3) The particular grounds of such contest.

"C. No such election contest shall be maintained and no bond election shall be set aside or held invalid unless a complaint is filed as permitted hereunder within the period prescribed in this section. As to bond elections which have been held prior to the effective date (March 21, 1969) of this act, no such contest shall be maintained wherein it is alleged that

> the bond election should be set aside or held on any ground enumerated in section 34-2001 or on any other ground, unless such bond election contest be filed as herein provided within forty (40) days from and after the effective date of this act."

This statute is clear and without exception. There is nothing in the section which even suggests that it does not now apply. Because the plaintiffs' petition was not filed within forty days after the election was held, the votes "canvassed, and the results thereof declared," we should dismiss this action. It was not timely brought because it was barred by I.C. § 34-2001A.

The majority, understandably anxious to reach the important constitutional issue raised in this case, has held that the defendants "waived" I.C. § 34-2001A. Such waiver is not lawful. The defendants can not waive the bar of I.C. § 34-2001A. As was said by the Supreme Court of Arizona in the case of City of Glendale v. Coquat, 52 P.2d 1178, 1180 (1935),

> "It is apparently universally held that where a right has been given to an individual not alone for his private benefit but, as a matter of public

policy, in the interest of the state, it may not be waived by any one. Day v. McAllister, 15 Gray (Mass.) 433; Clark v. Spencer, 14 Kan. 398, 19 Am. Rep. 96; State v. Carman, 63 Iowa 130, 18 N.W. 691, 50 Am. Rep. 741; Recht v. Kelly, 82 Ill. 147, 25 Am. Rep. 301; Bosler v. Rheem, 72 Pa. 54; Branch v. Tomlinson, 77 N.C. 388; Clark v. State, 142 N.Y. 101, 36 N.E. 817; Larsen v. Rice, 100 Wash. 642, 171 P. 1037; Cata v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203, 41 A.L.R. 439. As was said by the New York Court of Appeals, in Wright v. State, 223 N.Y. 44, 119 N.E. 83, 85, 'Such conclusion would permit an officer of the state to defeat the beneficent purpose of the statute and violate its provisions.' "

Buyers of Idaho bonds forty days after an election must be secure in the knowledge that their investment will not be jeopardized by a legal action contesting that election. By allowing these defendants to waive I.C. § 34-2001A, this Court has thrown open to challenge every bond election in the past or in the future of this state.

A valid "waiver" necessarily involves a choice to give up a right personal to the party doing the waiving. In order for a "waiver" to be permissible

in this case a representative of the purchasers of the bonds, issued as a result of the election which is challenged in this action, would have to be a party. There is no such representative before us. The record provides no indication that the defendants have been authorized to make a waiver under I.C. § 34-2001A for those bondholders. The defendants' attempt to waive the provisions of the statute should be given no effect. This action was not timely brought.

I respectfully dissent from the opinion of the majority.

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No. 1066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CITY OF PHOENIX, ARIZONA, et al.,

Appellant,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR SPECIAL TAX SCHOOL DISTRICT NUMBER ONE OF THE COUNTY OF HILLSBOROUGH, FLORIDA AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of Special Tax School District Number One of the County of Hillsborough, a political subdivision of the State of Florida, hereinafter referred to as School District, and is sponsored by the attorney of the School Board of Hillsborough County, Florida, the authorized law officer thereof, under Rule 42 (4) of the Rules of the Supreme Court of the United States. The School District's interest is that on July 15, 1969 an election was held in the School District at which only property taxpaying electors were permitted to vote on the question of authorizing an ad valorem bond issue of the School District in the amount of $19,150,000.00 for the purpose of acquiring, building, enlarging, furnishing or otherwise improving school buildings or school grounds

and for other capital school purposes. Such an election is required by the Constitution of the State of Florida, Article VII, Section 12[1] and by applicable statutes[2] and is limited to electors who are owners of freeholds not wholly exempt from taxation. When issued, all of such bonds will be general obligations of the School District payable from ad valorem taxes. In a proceeding instituted by the School District pursuant to the provisions of Chapter 75, Florida Statutes, the bonds were held to be legal and valid general obligations of the School District by a judgment of the Circuit Court for Hillsborough County, Florida rendered on November 12, 1969.[3]

By reason of the prior opinions of the Court in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed. 2d 647 (1969) and *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583 (1969), a suit was instituted in the United States District Court for the Middle District of Florida by certain qualified voters of the School District who paid no real property taxes seeking to have Section 12, Article VII of the Constitution of Florida declared unconstitutional on the ground that the limitation in bond elections to electors who are owners of freeholds not wholly exempt

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[1] Article VII, Section 12 reads as follows: SECTION 12. Local bonds.—Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:

(a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or

(b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

[2] Sections 236.37-39, Florida Statutes.

[3] The Board of Public Instruction of Hillsborough County, Florida, for and on behalf of Special Tax School District Number One, Plaintiff, vs. State of Florida, and the Taxpayers, Property Owners and Citizens of the County of Hillsborough, including non-residents owning property or subject to taxation therein, Defendants.

from taxation violates the equal protection clause in the Fourteenth Amendment to the United States Constitution.[4]

The opinion of the Court in the *Cipriano* case, supra, and the institution of the proceedings in the United States District Court for the Middle District of Florida, have impaired the marketability of the bonds of the School District because prospective purchasers fear that such bonds will be subsequently declared void if issued in reliance upon the bond election held on July 15, 1969.

The School District cannot submit the bond issue to a second election in which all qualified voters may participate since there are no laws in the State of Florida which would authorize the holding of such an election.

The School District urges the Court to declare valid the bond election held by the City of Phoenix even though such election was restricted to property taxpaying voters.

The School District submits that the facts and questions of law pertaining to bond issues of political subdivisions of Florida cannot be adequately presented by the parties because such parties are only involved with questions of Arizona law.

ARGUMENT

Point I

Special Tax School District Number One of Hillsborough County, Florida has authorized the issuance of $19,150,000.00 general obligation bonds for the improvement of school facilities. Pursuant to Article VII, Section 12(a) of

[4] Jim Fair, Plaintiff, and Elizabeth M. Axtell and Nell S. Stewart, Intervenors, vs. Jim Fair, as Supervisor of Elections, Board of Public Instruction, County Election Board, Board of County Commissioners, all of Hillsborough County, Florida, and the Attorney General of Florida, Earl Faircloth, Defendants, Civ.T. #69-263, in the United States District Court for the Middle District of Florida, Tampa Division.

the Constitution of the State of Florida,[5] these bonds were voted at an election limited to electors who were owners of freeholds therein not wholly exempt from taxation. The decision in *Cipriano v. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) held that the provisions of Louisiana law restricting to property taxpayers the right to vote in *revenue* bond elections violate the equal protection clause of the Fourteenth Amendment of the United States Constitution. This doctrine may likewise be applied subsequently to preclude states in their constitutions and statutes from restricting to property owners or taxpayers the right to vote in general obligation bond elections. Consequently, prospective purchasers are reluctant to purchase the bonds voted at the School District election.

The *Cipriano* case and *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), indicate that state constitutional provisions and statutes having a voter classification are not in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution where (1) the exclusions are necessary to promote a compelling state interest and (2) those persons excluded are in fact substantially less interested or affected than those included. The Court, therefore, should hold that general obligation bonds payable solely from ad valorem taxes are in a separate category from revenue bonds, and thus are constitutionally capable of being approved in an election limited to those qualified voters who pay property taxes. The impact of the issuance of general obligation bonds on property owners is directly related to their status as property taxpaying electors. A person who is not a property owner and who does not pay property taxes has only an indirect and remote interest in the issuance of such bonds. The *Cipriano* decision was based on the fact that property owners alone were allowed to

[5] *Supra,* note 1.

vote on a *revenue* bond issue to be paid by both property owners and non property owners from sources other than ad valorem taxation. As stated in the *Cipriano* case the impact of the revenue bond issue on both classes of individuals was entirely unconnected to their status as property taxpayers. If the decision of the *Cipriano* case is extended to general obligation bonds, both property owners and non property owners will be allowed to vote in bond issues which will be directly paid only by property owners.

The Court is respectfully requested not to extend the *Cipriano* decision to elections authorizing the issuance of general obligation bonds.

Point II

If the Court holds invalid the general obligation bond election of the City of Phoenix, it is respectfully requested that such decision be limited specifically to the State of Arizona. The reasons for the constitutional classification which exist in Arizona may not necessarily be the same as those which exist in Florida.

Neither the Constitution nor the general laws of the State of Florida require that revenue bonds be approved at *any* election. As stated above, under the Constitution and statutes of the State of Florida, a political subdivision may issue bonds payable from ad valorem taxes only if such bonds are approved by the electors who are owners of freeholds not wholly exempt from taxation. The sole question, therefore, is whether this constitutional classification of voters violates the equal protection clause of the Fourteenth Amendment by rendering ineligible to vote those otherwise qualified voters who do not pay taxes on real estate.

The validity of the Florida Constitution and statutes depends upon whether the particular classification of voters is

reasonable under the circumstances existing within the State of Florida.

In *Walters v. City of St. Louis,* 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505, (1954) the Court stated:

> "* * *. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

In *Carrington v. Rash,* 330 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775, (1965) the Court said:

> "* * *. There can be no doubt either of the historic function of the States to establish, on a nondiscriminary basis, and in accordance with the Constitution, other qualifications (than residence) for the exercise of the franchise. Indeed the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised * * *."

The forerunner of the provision of the Florida Constitution relating to the issuance of bonds by the political subdivisions was first ratified by all the qualified electors of the State in 1929[6] to correct gross abuses arising out of the Florida real

[6] Article IX, Section 6, Constitution of Florida 1885, as amended. Section 6. Bonds; state, county, municipal.—The Legislature shall have power to provide for issuing State bonds only for the purpose of repelling invasion or suppressing insurrection, and the Counties, Districts, or Municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such Counties, Districts, or Municipalities shall participate, to be held in the manner to

estate boom of the 1920's. The history of and reasons for these constitutional provisions have been clearly stated by the Supreme Court of Florida in a number of decisions.

In *Cloverleaf v. City of Jacksonville*, 135 Fla. 341, 199 So. 923, (1941) the Court said:

> "After the period of almost uncontrolled incurrence of debt by municipal corporations in 1925 and succeeding years, of which all know *and we take judicial notice*, restraint on the part of the people was decided upon so that governing authorities could not, without the approval of those who would bear the burden, encumber the property of taxpayers * * *." (Italics supplied)

Likewise in *State v. Florida State Improvement Commission*, 60 So. 2d 747, (Fla. 1952), the Court elaborated at length upon the history of these particular provisions of the Constitution and the reasons for their adoption. The Court stated:

> "Prior to the adoption of the amended Section 6 of Article IX of the State Constitution, bonds could be issued for any county purpose and without the vote of the freeholders or the people of the county if properly authorized by the Legislature. * * * The only acts necessary for the issuance of such bonds and the levy and collection of ad valorem taxes were to have a delegation in the Legislature from the county who would put through a special act and a board of county commissioners of a county who

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[6] (Continued)
be prescribed by law; but the provisions of this act shall not apply to the refunding of bonds issued exclusively for the purpose of refunding of the bonds or the interest thereon of such Counties, Districts, or Municipalities.

would perform under the Act and then bonds could be issued *and ad valorem taxes* levied without any vote of the freeholders or the people who had to pay the bill.

"* * *

"Many of us lived through the times immediately prior to the adoption of the amended Section 6 of Article IX of the State Constitution, and are thoroughly familiar with the conditions and the history of the times which resulted in a demand on the part of the people for this amendment.

"Hundreds of millions of dollars in bonds had been issued by municipalities and counties throughout the state. These bonds were issued pursuant to hundreds of special acts of the Legislature. These acts were passed by the Legislature as local bills and without the approval of anyone except the delegation in the Legislature from the county affected. Under these various acts, ad valorem taxes were levied and the future credit of the governmental unit pledged without the approving voice of the freeholders or the people who had to pay the taxes. Most of these bonds were issued during the period known as the 'Boom Days'. The 'Boom' burst—a depression was on and the people and the freeholders found themselves saddled with debts impossible for them to pay. Millions of these bonds sold for less than 20% of par and some of them for less than 10% of par. Defaults multiplied throughout the state. The effect was as could be expected. The people awakened to the fact not only that an intolerable burden had been placed upon them far beyond their ability to pay, but also that the very welfare of the State was threatened, because of the weak-

ened credit structure. Indeed, such was the impact that even the Congress of the United States took cognizance of the financial condition of Florida municipalities and amended the Federal Bankruptcy Act, 11 U.S.C.A. §1 et seq., so as to bring bankrupt municipalities within its terms. Many Florida cities and towns took advantage of this amended act.

"It was during such times and under these conditions that the Legislature of 1929, in response to the demands of the people, adopted the proposal to amend Section 6 of Article IX of the Constitution. In the ensuing general election the proposed amendment was adopted. There are no exceptions in the amendment." (Italics supplied)

By reason of the constitutional history of Florida as related by the Florida Supreme Court, the requirement that bonds payable from ad valorem taxation be approved by vote of the electors who are owners of freeholds not wholly exempt from taxation serves a compelling state interest and provides a reasonable classification well within the approved limits of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The issuance of general obligation bonds is directly connected to the status of the participating electors as property taxpayers. These taxpayers who are permitted to vote in general obligation bond elections have a substantial and direct interest in the decision as to whether such bonds should be issued.

Point III

Should the Court decide that the election at which the City of Phoenix approved the general obligation bonds in question was invalid due to its limitation to property taxpaying voters, it is respectfully requested that such a decision be

applied prospectively and not retroactively. The Court in the *Cipriano* case stated that in some circumstances a state might constitutionally limit the election franchise to qualified voters who are specially interested in the election and indicated that such a result could be legally possible where the impact of a bond issue is directly connected to their status as property taxpayers. A fair reading of the opinion of the Court in the *Cipriano* case discloses an intent on the part of the Court to limit its decision to those elections controlling the issuance of revenue bonds as distinguished from general obligation bonds.

Accordingly, some general obligation bonds have been issued by political subdivisions in Florida pursuant to elections limited to property taxpaying electors held subsequent to the decision of this Court in the *Cipriano* case. No purpose could be served in a retroactive application of the Court's decision since substantial injustice and hardship could result under such circumstances.

SUMMARY OF ARGUMENT

The decision of this Court in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) created uncertainty as to the constitutionality of statutory or state constitutional provisions permitting only property taxpaying electors to vote in general obligation bond elections. Amicus Curiae respectfully requests that the Court rule for the City of Phoenix and hold that general obligation bond elections are valid when restricted to property taxpaying electors for the reason that the persons within this classification pay the bonds through ad valorem taxes and thus are the only persons directly interested and affected. Second, should the Court rule against the City of Phoenix, it is respectfully requested that the decision be limited to the State of Arizona, as such a decision may be reasonable when applied in Arizona but unreasonable when applied in other states. Third. if the

Court decides against the City of Phoenix, it is urged that the decision be applied prospectively and not retroactively, in order that past innocent purchasers of general obligation bonds do not suffer an injustice or hardship.

CONCLUSION

The Arizona constitutional provision restricting the franchise in general obligation bond elections to taxpaying property owners is a reasonable classification. When such a classification is reasonable, it should be upheld since the equal protection clause of the Fourteenth Amendment does not prohibit the states from providing the political machinery suitable for local needs and problems. Thus Special Tax School District Number One of the County of Hillsborough, Florida, as Amicus Curiae, urges the Court to decide in favor of the validity of the general obligation bond election of the City of Phoenix, Arizona. Should the Court decide against the validity of that election, it is requested that the decision be limited to the City of Phoenix. It is also requested that the decision be given non-retroactive application.

Respectfully submitted,

W. Crosby Few
725 East Kennedy Boulevard
Tampa, Florida

PROOF OF SERVICE

I, the undersigned counsel for Amicus Curiae, Special Tax School District Number One of the County of Hillsborough, Florida, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this 11th day of February, 1970.

W. Cooley Fees

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OCTOBER TERM, 1969

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Appellants,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal From The United States District Court
For The District Of Arizona

BRIEF FOR THE STATE OF ARIZONA AS AMICUS CURIAE

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In The

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BRIEF FOR THE STATE OF ARIZONA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

The Attorney General as chief legal officer of the State of Arizona hereby requests that the Court take jurisdiction of the above entitled matter.

The Jurisdictional Statement of the Appellant, City

of Phoenix, is hereby adopted in full by your Petitioner for the reasons stated in the Jurisdictional Statement of the Appellant. I respectfully request that the Court take jurisdiction of this matter and render its decision as soon as possible in order that the present situation regarding the sale of municipal bonds in the State of Arizona can be rectified.

Respectfully submitted,

GARY K. NELSON
The Attorney General
Capitol Building
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CERTIFICATE

I, the undersigned counsel for Amicus Curiae, The State of Arizona, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this 13th day of February, 1970

Gary K. Nelson

SUPREME COURT, U. S.

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Appellee.

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For The District of Arizona

BRIEF FOR THE PARISH SCHOOL BOARD OF CADDO PARISH, LOUISIANA, AS THE GOVERNING AUTHORITY OF PARISH-WIDE SCHOOL DISTRICT OF CADDO PARISH, LOUISIANA, AS AMICUS CURIAE

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MAY IT PLEASE THE COURT:

This brief is filed on behalf of Parish-Wide School District of Caddo Parish, Louisiana, a political subdivision of the State of Louisiana, and is sponsored by the Parish-Wide School District Attorney, the authorized law officer thereof under Rule 42(4) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

The extent to which a decision affirming the decision of the lower court should apply to bond elections held, and bonds delivered, prior to the date of the decision by this court, and to bond elections conducted thereafter.

INTEREST OF AMICUS CURIAE

Pursuant to resolution duly adopted by the Parish School Board of Caddo Parish, Louisiana, on April 23, 1969, a special election was held in Parish-Wide School District of Caddo Parish, Louisiana, on May 27, 1969, at which there were submitted to the qualified taxpaying voters of the school district, pursuant to the Constitution and Laws of the State of Louisiana, three propositions. Proposition Number One was for the levy of a special three mill tax for maintenance purposes, Proposition Number Two was for the levy of a special four mill tax for construction purposes, and Proposition Number Three was for the issuance of school bonds in the amount of $10,000,000, payable from unlimited ad valorem taxes. The election at which such propositions were submitted was duly held and conducted on May 27, 1969, and on May 29, 1969, the Parish School Board of Caddo Parish, Louisiana, met and canvassed the results of the election, and found that the majority in number and amount of the qualified taxpaying voters of said district, voting at said election, was in favor of each of said propositions. The results of said election were promulgated by publication of the proces verbal of the election on June 13, 1969. The peremption period provided in R.S. 39:518, and Section 14(n), Article 14, of the Constitution of the State of Louisiana, expired without challenge to the validity of the bonds or to the propositions for special millage taxation, on August 12, 1969.

On June 16, 1969, this Court decided the cases of *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, and *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647. Under the wording of the *Cipriano* case the question of the applicability of the rationale of the *Kramer* case to the validity of taxpayer qualifications at general obligation bond elections was not decided.

The complaint in this case was filed on August 1, 1969, prior to the expiration of the state contest period with respect to the May 27, 1969 election held in Parish-Wide School District of Caddo Parish, Louisiana. The United States District Court for the District of Arizona, in its opinion of November 17, 1969, held the Phoenix election involved in this appeal invalid as to both the revenue and the general obligation propositions submitted at that election, irrespective of the fact that, as the court noted in its opinion: "Under Arizona law the period during which an elector may contest an election is limited to five (5) days following the canvass of the election and the declaration of the results thereof. 16 A.R.S. 1202, 1204." Jurisdictional Statement of Appellant, Page 18. Inasmuch as the lower court applied the *Cipriano* decision to general obligation bond elections, disregarding the passage of the state contest period, the practical effect of such decision, and the pendency of such litigation and this appeal, has been to prevent the Parish-Wide School District of Caddo Parish, Louisiana, and all similarly situated political subdivisions, from successfully obtaining bids for the sale of the bonds voted at the May 27, 1969 election. The very question in this appeal applies to the validity of the bond election held in the Parish-Wide School District of Caddo Parish, Louisiana, and until the resolution of this case on this appeal, the School Board of Caddo Parish, Louisiana, cannot hope to obtain bids for the sale of the bonds voted at the May 27, 1969 election.

A brief description of the impact of this delay on the financial programs contemplated by the Caddo Parish School Board is in order. The May 27, 1969 bond election was the result of a recommendation presented to the board by a Citizen's Advisory Committee. This report contemplated a four mill special tax to produce approximately $10,000,000 over a five year period and in addition the $10,000,000 general obligation bond issue was proposed to provide a total of $20,000,000 for capital improvements during the period.

At the present time the board is levying the five mill tax which is the sole source of revenue for the improvement program. The failure to be able to sell the bonds has resulted in a marked slowdown in the schedule of the improvement program. One example is the pressing need of the community for the construction of vocational-technical school facilities, but the necessary funds have not been available for the board to begin construction on the designated site.

In the absence of the needed capital improvements resort has been had to temporary facilities with a consequent reduction in program offerings. At the present time 135 temporary classrooms are being used to supplement permanent facilities.

In the Vivian area of the school district, prior plans called for the demolition of existing schools and replacement with modern construction. This has been deferred, hence under the impact of the court ordered unitary system, the students in this area are bused ten miles to another school where space is available.

The delay in receipt of the proceeds of the bond issue is seriously affecting the capability of the Caddo Parish School Board to implement the court order for the unitary system. The portion of the order requiring the realignment of the schools from a K-6 and 3-3 program

to a K-5 and 3-4 program will also require additions and major modifications to many of the existing plants.

A continued lack of funding capacity can only result in the reduction of offerings, overcrowded conditions, temporary facilities and the lack of opportunity for all segments of the community. The school authorities find themselves at this time approximately two years behind in a five year, carefully planned development program.

SUMMARY OF ARGUMENT

In the *Cipriano* case, this court recognized the necessity of applying its decision prospectively only, and thereby did not cast doubt on the validity of revenue bonds actually delivered and issued prior to the date of that decision. There is no reason to believe that this Court, if it affirms the decision of the lower court, will hold differently as to the retroactive effect of its decision with respect to general obligation bond issues which are outstanding in the hands of the purchasers thereof on the date of the opinion in this case.

However, difficult and substantial questions of interpretation have arisen as to the meaning and the application of the language in the Per Curiam opinion of this Court in *Cipriano,* at least as applied to bond elections held prior to June 16, 1969 where bonds voted at such elections were not issued and in the hands of the purchasers on June 16, 1969. It is the desire of the *Amicus Curiae* in this brief to discuss the problems which have arisen under the prospective language used in the *Cipriano* opinion and to respectfully suggest methods which might be considered by this Court, assuming, *arguendo,* that the decision of the lower court is to be affirmed, when determining the retroactive and prospective application of its decision to other than the bond election held in the City of Phoenix and which is the subject of this appeal.

ARGUMENT

As urged in the briefs filed *Amicus Curiae* in this Court in the *Cipriano* litigation for the Salt River Project Agricultural Improvement and Power District, for the State of Louisiana, and for the Louisiana Municipal Association, this Court in the opinion in *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, recognized the significant hardships which would be present if the decision in that case were to be given full retroactive effect. The *Cipriano* opinion makes clear that the validity of bonds actually delivered and in the hands of purchasers prior to the date of that decision on June 16, 1969 cannot be challenged. As pointed out in such briefs filed with this Court in the *Cipriano* case, prior decisions of this Court, which need not be cited again to the Court in this brief, provide adequate authority for this Court to make its decision in this case prospective only, so that the millions of dollars of outstanding general obligation bond issues issued in the states which have heretofore required property tax qualifications at bond elections, will not be affected and no question may be raised as to the validity of those outstanding bonds. *Amicus Curiae* however respectfully suggests that this Court specifically reiterate that an affirmance of the decision of the lower court will not affect in any way the validity of the outstanding general obligation bonds.

The pertinent language of this Court in the *Cipriano* case dealing with the prospective nature of the opinion is as follows:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given

> full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940). Cf. *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization. 395 U.S. at 706.

This language has raised numerous questions of interpretation, as applied to both general obligation and revenue bond issues under various state laws, and it is the desire of this brief to respectfully suggest to this Court methods of interpretation or application which might be adopted by this Court when setting forth the retroactive versus prospective nature of a decision in this appeal.

One of the results of the *Cipriano* decision has been to cause the filing of many lawsuits questioning the validity of bond elections. Some of the lawsuits have been occasioned by the fact that this Court was unable to treat both general obligation bonds and revenue bonds in the *Cipriano* opinion. This was, of course, unavoidable, but now that this Court has a case before it dealing with

the general obligation bond question, and recognizing the somewhat difficult problem of applying this type of a decision to situations involving many different types of state laws, it is desired to suggest guidelines to the Court for consideration.

It appears that part of the problem of interpretation of the *Cipriano* opinion arises from information given to the Court at the oral argument during presentation of the *Cipriano* case. Rebuttal argument of Kenneth Watson, Esquire, on behalf of the Appellant in the *Cipriano* case, Transcript, page 37 and 38, reads as follows:

> Q. Can you tell us whether every State has a finality period for contesting a bond issue? That finality period, that is measurable in months rather than years?
>
> A. No, sir, I can't off-hand tell you that, your Honor. I would be glad to have that matter checked and submit it to the court if the court would feel that it would want it. But I am not prepared to give the court that statement of fact as to the number of States that require months instead of years.
>
> I would certainly assume, however, as Mr. Huppenbauer has actually argued, that every State has some period that at some point you have to have a finality for somebody to buy the bonds.
>
> Q. I am sure of that, but in terms of years a decision such as you are requesting might very well be extremely disruptive and a great deal of money.
>
> A. I will only suggest that the question of years is in all probability not in play here, your Honor, as who would want to wait years before they could sell a bond? And I am sure nobody would want to buy a bond when the matter had not become final as Mr. Huppenbauer had suggested.

> They have to have an opinion from a competent bond attorney and these competent bond attorneys must certainly certify that the time for challenge has passed. I am sure no issuing authority would want to wait several years before they issued bonds.

This argument suggests that all the states have statutory peremption provisions similar to those contained in the statutes and Constitution of Louisiana, but it is not in fact accurate. In fact, Louisiana is one of the few states which has a prescriptive or peremptive period which has been consistently interpreted by the state court to prevent the questioning of bond elections, even on constitutional grounds, after the applicable sixty day period has elapsed. In addition to the diversity of state laws on the subject, there is the fact that in some states there is no applicable statute or constitutional provision which, under the reported decisions of the state court, has been held to apply to a bond election in the sense presented to this Court under Louisiana law as involved in *Cipriano*. So that the Court might be able to examine the diversity of state law provisions on the subject, we set forth the following discussion of the various state laws which we have been able to determine to have any relevance to this problem.

The statutory periods within which bond elections can be contested in the various states having some form of property or taxpayer requirement are in some instances very definite whereas in other instances they are both indefinite and unclear. In Alaska, *Alaska Statutes* Section 15.20.540 and Section 15.20.550 apply to state election contests. In *Turkington* v. *City of Kachemak*, 380 P.2d 593 (Alaska, 1963), the Supreme Court of Alaska held that since no statutory procedure had been prescribed for con-

testing local elections the procedure provided for contesting state elections could be followed, but did not decide if the passage of the statutory period would bar future challenges.

In Arizona, *Arizona Revised Statutes* Section 16-1204 provides that an "elector" may contest an election held in a county, city, town or political subdivision thereof, and by reference to Section 16-1202 provides that the contest must be begun within five days of the canvass and declaration of results. One question immediately arising from this language is that of whether or not a non-taxpayer precluded from voting at a bond election could contest the election at all in that he is not an "elector". Such a question becomes very significant in a situation such as the one now before this Court wherein non-property taxpayers are precluded from being electors and, arguably, could therefore be said to be prevented from raising the fact that they were not permitted to vote at the election. Section 35-454B, concerning bond elections, incorporates by reference these general election laws. A further problem arises from the fact that in referring to counties, cities, towns, and their political subdivisions Section 16-1204 makes no provisions for contesting elections held in other political subdivisions of the state. Section 16-1201 contains provisions for contesting statewide elections but contains no provisions for contesting elections of political subdivisions of the state. The hiatus created as a result of the incomplete language of these two sections, namely whether or not there is a contest statute applicable to elections held in political subdivisions of the state not enumerated in Section 16-1204, is demonstrated in such cases as *Scharer* v. *Bell*, 34 Ariz. 334, 271 Pac. 715 (1928) and *McCall* v. *City of Tombstone*, 21 Ariz. 161, 185 Pac. 942 (1919), where the courts recognized the uncertainty

of the application of the election contest statute. A final problem presented by these Arizona statutory sections is that in the absence of a statutory contest period applicable to a given election an Arizona court might be willing to overthrow the results of an election subsequent to the aforementioned five day period. This is evidenced by the case of *Morgan* v. *Board of Supervisors,* 67 Ariz. 133, 192 P.2d 236 (1948). In that case a school board election was attacked, the plaintiff contending that the school trustees, the election board, and other officials of the district had interferred with the fairness and freedom of the bond election. The case was *not* brought under an election contest statute, but the court stated that the trial court had jurisdiction to consider the matters having to do with the conduct of the election. Citing an Illinois case, the court explained that an equity court may consider matters which would normally be raised in a bond election contest in a later suit where the question of the fairness of the election is necessarily involved. The court here stated only that the suit was "timely brought," and therefore it is not clear from the decision whether such an action must be brought within the five day period provided for in Section 16-1202. As a result, this case further adds to the confusion as to the effect of the Arizona five day contest period.

There appears to be no applicable statutory contest period for bond elections in Colorado. Insofar as Florida is concerned, *Florida Statutes Annotated* Section 100.321 provides for the bringing of a suit to test the legality of bond elections. This section provides that the suit must be instituted within 60 days after the declaration of the results of the election or by way of intervention in a validation proceeding which has already been instituted for the purpose of procuring a judicial validation of the

bonds at issue. In Idaho Section 34-2001A of the *Idaho Code,* similar to the Florida statute, specifically provides for a suit challenging the validity of a bond election and similarly is specific in its provisions for a contest period, stating that such a suit must be brought within 40 days of the date of the canvass and declaration of election results. Louisiana is specific in this regard also providing in *R.S.* 39:518 that a suit to challenge a bond election must be instituted within 60 days of the date of the promulgation of the results of the election.

Michigan, like Colorado, appears to provide no relevant contest period, whereas Montana clearly provides that no action can be brought to restrain the issuance and sale of the bonds of various political subdivisions after the expiration of 60 days from the date of the order authorizing said issuance and sale. *Montana Revised Statutes* Section 93-2612.

While the Nevada statutes do provide contest periods for various types of elections, there appear to be no statutory provisions applicable to elections in general or to bond elections in particular. In New Mexico it is provided in *New Mexico Statutes 1953* Section 14-8-16, concerning the general category of municipal elections in New Mexico, that any action contesting "any question placed on the ballot" shall be maintained only if it is instituted within 30 days after the issuance of a certificate or notification of the results of the election by the municipal clerk. This contest period might apply to bond elections, however, the general bond provisions of the statutes (Sections 14-29-1 to 14-29-9) make no specific reference to it.

The New York laws are not very clear on this subject of bond election contest periods either. While *Election Code* Section 330 (5) provides that a "voter" may chal-

lenge the canvass of returns within 30 days after an alleged erroneous statement or determination is made, this section is a general one not specifically concerned with bond elections. Additionally, *Local Finance Code* Sections 80 to 83 permit the local finance board to adopt a resolution which, in effect, creates a twenty day contest period within which the validity of municipal obligations can be contested. Therefore, there might be two contest periods applicable to a given bond issue. To further confuse matters, the twenty day period does not appear to cut off constitutional rights, thereby rendering the expiration of this period as somewhat ineffective insofar as it tends to establish the complete validity of the obligations. The most specific section of the *Oklahoma Statutes* concerning bond elections would appear to be Section 13 of Title 62 which specifically concerns munipical bonds and states that the bond commissioner shall issue a certificate approving a bond issue after examining into and passing upon the bonds to be issued. It then provides that the bonds shall be incontestable in any court in the state of Oklahoma unless suit thereon shall have been brought within 30 days from the date of the bond commissioner's approval.

Rhode Island does not appear to have any statutory provisions relating to bond election contest periods. In Texas, *Election Code* Article 9.03 contains a general section requiring that notice of an election contest must be brought within 30 days of the return day of the election. In Utah, Section 11-14-12 of the *Utah Code Annotated*, specifically provides for bond election contests and allows such contests to be brought within 40 days after the returns of the election are canvassed and the results thereof declared. Finally, in Wyoming it is provided in *Wyoming Statutes* Section 22-323 that insofar as elections held in

Wyoming counties, cities, or towns are concerned, any five "electors" may contest an election upon any subject which may by law be submitted to a vote of the people within 30 days after the result of the election has been determined.

Inasmuch as it is not altogether determinable without further litigation whether under most state laws there was any time for challenging the election result which could have expired on June 16, 1969, under the language in the *Cipriano* opinion, it is submitted that this court has the opportunity in this case to set at rest questions of uncertainty arising from the above quoted language from the *Cipriano* opinion as to revenue bonds and to establish guidelines which will determine the same questions as to general obligation bond elections without the necessity of further extensive litigation.

As pointed out above, there are some states where no bond election contest period is applicable. As to bond elections held in those states, the question is presented under the prospective language of the *Cipriano* opinion whether a bond election held five, ten or even fifteen years ago may be attacked on voting restriction grounds. A difficult question has also been posed where bonds were issued in series, so that on June 16, 1969 part of the bonds voted at an election were in the hands of purchasers but part of the voted bonds were still unissued and unsold. The *Cipriano* opinion makes clear that the bonds which were actually delivered cannot be attacked, but it does not answer the question of whether or not the bonds remaining unissued are subject to attack under the rationale of the *Cipriano* and *Kramer* decisions. The result is to place political subdivisions in states which have no contest period under a disability not shared by the other states which do have a contest period.

In the *Cipriano* opinion this Court, after referring to the time for challenging the election under state law, added the following sentence: "Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision." 395 U.S. at 706. As generally understood with respect to the issuance of municipal securities, the reference to the authorization to issue the securities becoming legally complete would not necessarily mean the same as a reference to the expiration under state law of the time for challenging the election result. "Authorization" is sometimes considered to refer to adoption of a bond ordinance specifically describing the particular series or issue of bonds currently to be sold, especially where reference is made to such authorization becoming legally complete. In the interpretation of the language of the *Cipriano* opinion, the question is thus raised whether, by the addition of the reference to the authorization being legally complete, this Court was referring to the expiration of the state contest period only and equating "legally complete" to such expiration, or whether the court was suggesting a different and additional test. It can be seen that this makes considerable difference in a state where there is no applicable bond election contest period, or where the state law is not clear as to the application of election contest periods generally to bond elections. In such states there is no way of knowing exactly what concept this Court had in mind when it spoke of "legally complete". The result is to throw into question bond elections held in those states before June 16, 1969 and to pave the way for future litigation.

In the states where a contest period can be thought to apply to a bond election, the language of the Cipriano opinion does not make clear whether, when the contest period expired after June 16, 1969, the revenue bond

election was void, or merely voidable if the question of the application of the *Cipriano* case to the election is actually raised in a court before the state contest period expires.

As an example, the May 27, 1969 general obligation bond election held in Parish-Wide School District of Caddo Parish, Louisiana has not been challenged in the courts and the peremptive period provided by the Louisiana constitution and statutes has expired, but under the decision of the lower court in the question as to the validity of the general obligation bond election is kept open since the election contest had not expired on June 16, 1969. This situation illustrates the confusion arising from the language used in the *Cipriano* opinion and the fact that many political subdivisions will not be able to proceed to issue previously vetoed general obligation and revenue bonds unless such language is clarified.

In the *Cipriano* language quoted *supra,* this Court referred to the fact that its opinion would be applied retroactively in cases brought within the time provided by state law for challenging the election and which were not yet final on June 16, 1969. Several instances have arisen where, on June 16, 1969, litigation, on grounds other than constitutional grounds dealt with in the *Cipriano* opinion, was pending as to general obligation bond elections. The litigation in such instances was concluded and the appropriate appeal periods expired after the date of the *Cipriano* opinion without the question being raised that the elections involved were limited to property owners or taxpayers. Again the question is presented where such litigation was pending on June 16, 1969, whether the general obligation bond election was thereby voided or was it only made voidable if the applicable date is June 16, 1969.

That is, in those instances was the bond election made subject to attack on *Cipriano* grounds at any time in the future, or was the result of the *Cipriano* decision merely that until the litigation became final *Cipriano* grounds could be utilized and the bond election voided, but that once the state contest or appeal period had passed without such challenge, the bond election was valid and not subject to attack on federal constitutional grounds?

Pending in this court on writ of certiorari from the Supreme Court of Louisiana is *Chambers* v. *Road District No. 505 of Tangipahoa Parish, Louisiana,* Number 1133, October Term, in which is presented to this court some of the questions raised above. Possibly involved in such litigation is the validity of a state contest provision under the federal constitution and the question of whether or not federal rights are denied by the application by the states of such a contest provision after June 16, 1969. Even as to the Louisiana contest provision, an early federal decision indicated that the passage of the state period might not serve to cut off federal rights in the federal courts.[1] A further constitutional problem inherent in this area is the reasonableness of the time permitted under state law for the challenge of the bond election result. While this court might find that the 60-day period provided under Louisiana Law, running from the publication in a local newspaper of the promulgation of the proces verbal of the election, might satisfy federal constitutional requirements, query, does the passage of the 5-day period provided by *Arizona Revised Statutes,* Section 16-1202 and Section 16-1204, satisfy constitutional standards of federal due process even if made applicable to bond elections by the Arizona Supreme Court?

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[1] Wight v. Police Jury of Parish of Avoyelles, La., 264 Fed. 705 (5th Cir. 1919).

The above questions are certain to be raised in this Court, but such litigation can be avoided if the uncertainties surrounding the language of the *Cipriano* opinion can be dealt with and guidelines adopted governing the prospective application of the decision.

Amicus Curiae therefore respectfully requests this Court to consider the following as the basis for any prospective ruling included in the affirmance of the decision of the lower court.

Ideally, the least confusion, and the most clarification could be obtained by a decision of this Court holding that all bond elections held prior to the affirmance by this Court of the lower court decision may not be subjected to attack on the ground that the law under which the election was conducted limited the right to vote to taxpayers only, irrespective of such grounds as might still exist under state law for the challenge of the election. This would forestall all challenges to bond elections theretofore held and would be a truly prospective application.[2]

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[2] As this brief was being completed word was received that a three-judge court in the United States District Court, Eastern District of Louisiana, New Orleans Division, in a case styled *Stewart et. al.* v. *the Parish School Board of the Parish of St. Charles, and School District No. 1 of the Parish of St. Charles*, Civil Action No. 69-2818, Section "E", on February 25, 1970 held invalid a September 23, 1969 general obligation bond election. In that case the result of the bond election was promulgated on October 2, 1969, and the litigation was instituted on November 21, 1969, within the peremptive period provided for in Section 14(n) of Article 14 of the Louisiana Constitution. The ruling of the court that general obligation bond elections conducted after June 16, 1969 are subject to attack under the theory of the *Kramer* and *Cipriano* cases reenforces and re-emphasizes the necessity of this Court in this appeal providing in definite terms a uniform date of application of its holdings in all states as to the two types of bond elections.

Recognizing, however, the necessity of consistency in the application of the decisions treating revenue bonds and general obligation bonds but nevertheless recognizing the importance of not applying June 16, 1969, as the determining date as to general obligation bond elections, and recognizing that the Court may not now wish to base the prospectivity of its opinion in this case solely on the question of whether or not the election was held before the date of the opinion, the following is offered for consideration by this Court.

First should be considered all elections on the issuance of general obligation bonds held prior to whatever new date is fixed by this Court in its opinion in this case, and in respect of elections held prior to June 16, 1969, on the issuance of general obligation bonds. Because of the problems pointed out above with respect to the application of the *Cipriano* opinion to revenue bonds, it is submitted that it will be of great help to the states and political subdivisions involved if this Court should treat both general obligation bond elections held prior to the new date fixed by this Court and revenue bond elections held prior to June 16, 1969 as being subject to the same test. As to such elections held prior to June 16, 1969 or, as the case may be, the new date, it is respectfully submitted that the Court hold that unless the bond election had been challenged on the grounds non-taxpayers were not permitted to vote, prior to the expiration of a determinable state contest period or in states where there is no determinable period prior to the date of the decision affirming the lower court, whichever date is *earlier,* then such decision will not be applied retroactively under any circumstance. Such a holding would mean that as of the date of the new opinion all states would be treated exactly the same and all general obligation and revenue bond issues voted before June 16, 1969,

then unchallenged could be issued, and would also preserve the rights of those plaintiffs who, prior to the date of such decision, had challenged the bond election in question on the ground that non-taxpayers were not permitted to vote.

Second should be considered general obligation bonds issued and delivered to the purchasers thereof prior to the date of the opinion affirming the decision of the lower court. It has been uniformly assumed that, irrespective of any future decision by this Court with respect to the application of *Cipriano* to general obligation bond issues, this Court would never hold that general obligation bonds actually delivered to the purchasers thereof prior to June 16, 1969, or prior to the new date selected by this Court in its opinion in this case, could be attacked. It is respectfully submitted to the Court that the applicable date should be the date of the new opinion and therefore that it hold that such opinion have no retroactive application to general obligation bonds, whenever voted, if issued and in the hands of the purchasers thereof on the date of its opinion affirming the decision of the lower court.

Third should be considered general obligation bond elections held since June 16, 1969. Few, if any, revenue bond elections have been held since the date of the *Cipriano* decision except in those states which have been able to change their laws so as to permit the holding of such bond elections at which all qualified electors might vote. There have been, however, elections held in many states since June 16, 1969 in which general obligation bonds were voted where only property owners or taxpayers voted. To avoid the problems inherent in the *Cipriano* opinion, it is respectfully requested that this Court hold that general obligation bonds voted at elections held since June

16, 1969, if unchallenged on the date of the opinion affirming the lower court in states where no determinable contest period is applicable, or unchallenged at the expiration of the state contest period in states which have determinable contest periods, whichever date is *later*, may not be later challenged on grounds only property owners or taxpayers were permitted to vote. Applying the decision prospectively as so suggested would mean that all states would be treated alike in that if the bonds are not challenged on such federal constitutional grounds by a determinable date such question may never be raised, but it would preserve rights previously asserted or which could be raised under state law during the contest period. A holding of this nature would mean that further litigation would not be necessary to determine the effect of the state contest period passage after the decision affirming the decision of the lower court.

Fourth should be considered bond elections held subsequent to the decision affirming the decision of the lower court.

Many of the state legislatures have begun the process of changing state law to conform to the requirements of this Court with respect to voter qualifications at revenue bond elections. This is, however, a process which has been considerably handicapped by the hiatus resulting from the fact that this Court was unable to decide the constitutional question with respect to general obligation bonds at the same time as it decided the constitutional question with respect to revenue bonds. As has been pointed out to the Court in the many briefs filed in this appeal and need not be reiterated here by citations, many of the state voting requirements are of a constitutional nature and apply equally as well to general obligation bonds as to revenue

bonds. Questions have been considered therefore whether before a legislature may pass a law permitting all qualified electors to vote at a bond election, constitutional taxpayer requirements must be removed by amendment, or whether the result of the decisions by this Court automatically removes such restrictions from the state constitutions. There are obviously time delays involved in the submission of the necessary constitutional amendments, the enactment of the necessary legislation changing existing laws and the institution of litigation for the purpose of determining under state law the validity of legislative enactments providing for elections at which all qualified electors may vote. This problem has been compounded by the fact of the uncertainty of whether this Court would apply the rationale of the *Kramer* and *Cipriano* decisions to general obligation bonds. Thus, some of the state legislatures which have met since June 16, 1969, were unwilling to pass the necessary enabling legislation providing for the elimination of the taxpayer vote qualification until this Court had concluded that such taxpaying requirements were invalid. Since it is well recognized that political subdivisions must have specific authority to hold and conduct bond elections and to issue and sell bond issues, as has been pointed out to the court in numerous other briefs in this case, municipal financing in the states which have the property tax qualifications has been virtually nonexistent since June 16, 1969. There is considerable doubt as to whether or not the necessary legislative changes can be made in many of the states so as to permit an early resumption of financing if the decision of the lower court is affirmed. This problem will become even more acute should the court fail in a decision affirming the lower court to indicate that many of the previously voted but unissued general obligation bond issues described above may be safely issued, since

no machinery will exist to permit resubmission of the propositions.

It is therefore respectfully requested that the Court consider some of the following ways of ameliorating its decision affirming the decision of the lower court so as to give the states time to change their laws to conform to such a decision, but nevertheless permit bond elections to be held during the interim and to permit bonds to be issued and sold under such authorizations. *Amicus Curiae* requests that a decision be announced in this case as quickly as possible so that bond issues which have been deferred may be issued and to the extent required the state legislative changes may be commenced. The Court might also consider adopting a rule that until January 1, 1972 bonds voted at elections held under existing laws where only taxpayers voted may nevertheless be issued, unless litigation challenging the validity of the bonds is begun prior to the issuance of those bonds and the delivery to the purchasers thereof, but that after January 1, 1972 such federal constitutional grounds would apply to all bond elections thereafter conducted. This timetable would permit many legislatures to deal with the problem at their regular sessions in 1971 and would avoid costly special sessions. In the alternative the Court might consider adopting a rule that until January 1, 1972, qualified non-taxpaying electors could complain of the denial of their right to vote at a bond election only if they could affirmatively establish that if all non-property taxpayers who were qualified electors had voted against the bond issue the bond election would have failed; and that if such a suit is not brought prior to the time of the delivery of the bonds then neither the bond election nor the bonds could thereafter be attacked on such grounds, but that after January 1, 1972 such federal constitutional grounds would apply to all bond elections thereafter conducted.

Political subdivisions, such as *Amicus Curiae,* must of necessity be involved in the implementation of far reaching, well planned and conceived programs which can be accomplished only by raising the necessary funds under the procedures and processes provided for that purpose under state law. For the court to decree a period of time during which public financing must cease and important programs be halted makes little sense, as it will work havoc in the orderly financing and fiscal operations of such political subdivisions. Courts, when announcing sweeping changes in the existing laws, have traditionally recognized this problem and have provided means whereby a transitional period could be utilized.[3]

Unless the person challenging the bond election can timely establish that the result of the election would have

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[3] Thus the attention of the Court is called to *State* v. *Martin,* 384 P.2d 833 (Wash., 1963), a landmark case discussing the prospective overruling of prior decisions, but nevertheless preserving the validity of bonds issued and to be issued. Also illustrative of this approach of sustaining the viability of existing enactments are *State* v. *Community School District,* 78 N.W.2d 86 (Iowa, 1956) and *DeBerg* v. *County Board of Education,* 83 N.W.2d 734 (Iowa, 1957). In each case the Iowa Supreme Court initially declared the creation of school districts to be void, but in supplemental opinions ordered that the districts as created be allowed to operate as de facto entities for one year, to permit administration of the various schools. Similarly, in *Meyer* v. *Campbell,* 152 N.W.2d 697 (Iowa, 1967) and in *Mandicino* v. *Kelly,* 158 N.W.2d 754 (Iowa, 1968), the Iowa Supreme Court invalidated apportionment statutes governing certain local political subdivisions. The court nevertheless refused to enjoin the acts of the boards involved for at least a period of time sufficient to enable the state legislature to provide new enabling legislation, citing in one case as authority for so doing the opinion of this Court in *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1392, 12 L.Ed.2d 506.

been changed had he and the other members of his class been permitted to vote should not bonds voted under existing state procedures be permitted to be issued without doubt arising as to the constitutionality of such bonds? The principle that persons challenging bond elections must establish that the result would have been changed is well established,[4] and it is submitted could be properly adopted by this Court. It is therefore requested that this Court consider the serious problems facing the states in changing their laws and constitutions in order to conform to a decision affirming the decision of the lower court, and to permit an orderly transition to take place during which bond elections may be conducted and bonds validly issued.

CONCLUSION

If this Court should affirm the decision of the lower court an opportunity exists to forestall much future litigation affecting both general obligation and revenue bond elections. This can be accomplished by a speedy decision which makes unmistakable that the decision applies prospectively only. Several alternative suggestions are respectfully presented for the consideration of the Court as to the prospective nature of the opinion. In addition the desirability of providing a transitional period during which bond elections could continue to be held and bonds issued pending the making of the necessary legislative changes seems apparent. The Parish School Board of Caddo Parish, Louisiana, desires to discharge its duties

[4] See for example *Duncan* v. *Vernon Parish School Board*, 226 La. 379, 76 So.2d 403 (1954) and *Henley* v. *Elmore County*, 242 P.2d 855 (Idaho, 1952).

and responsibilities toward the community and the students of the school system, but it will be unable to do so pending the decision in this case. A speedy decision is therefore urgently requested.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel for *Amicus Curiae,* the Parish School Board of Caddo Parish, Louisiana, as the governing authority of Parish-Wide School District of Caddo Parish, Louisiana, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this ..... day of February, 1970

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the lower court has not yet been officially reported. A copy of that opinion is set forth in the Appendix.

JURISDICTION

This is an appeal from the judgment of a three-judge district court invalidating the following provisions of Arizona law insofar as they restrict elections to real property taxpayers who are qualified electors:

Article 7, Section 13, Arizona Constitution

Article 9, Section 8, Arizona Constitution

Title 9, Section 523, Arizona Revised Statutes

Title 35, Section 455, Arizona Revised Statutes

This appeal is taken from the judgment of the lower court insofar as it holds the foregoing provisions unconstitutional as applied to general obligation bond authorization elections, and specifically to the bond authorization election held by the City of Phoenix on June 10, 1969. The lower court entered its judgment on December 17, 1969. The Notice of Appeal was filed on December 19, 1969. A copy of the Judgment from which the appeal is taken is set forth in full in the Appendix.

This Court has jurisdiction by virtue of 28 U.S.C. Section 1223.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona Constitution, Article 7, Section 13

Submission of questions upon bond issues or special assessments

Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof affected by such question. As amended, election Nov. 4, 1930, eff. Dec. 1, 1930.

Arizona Constitution, Article 9, Section 8

Local debt limits; assent of taxpayers

No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and

towns assessments shall be taken from the last assessment for city or town purposes; Provided, that under no circumstances shall any county or school district become indebted to an amount exceeding ten per centum of such taxable property, as shown by the last assessment roll thereof; and Provided further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality. As amended, election Nov. 5, 1912, eff. Dec. 5, 1912.

Arizona Revised Statutes, Section 9-523

Bond election

Questions on bond issues under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

Arizona Revised Statutes, Section 35-452

Election to authorize indebtedness; qualifications of electors

A. The governing body or board of a political subdivision enumerated in § 35-451 may, and upon petition signed by fifteen per cent of its real property taxpayers who are qualified electors thereof shall, order an election by such taxpayers and electors to determine whether such indebtedness shall be authorized.

B. The order for the election in a school district shall be made by the board of supervisors in the county where such election will be held, either upon petition or upon request of the board of school trustees.

C. If a majority of the real property taxpayers who are qualified electors voting at the election vote in favor of creating an indebtedness in an amount exceeding four per cent of the value of the

taxable property of the political subdivision, such political subdivision may become so indebted.

Arizona Revised Statutes, Section 35-454

Notice of order for election; election; return; canvass of vote; certificate of election

A. The governing body or board of the political subdivision shall:

1. Post at least five copies of the order for election in public places within the subdivision in which the election is to be held at least twelve days prior to the day of the election.

2. Post a copy of the order at each polling place therein.

3. Publish a copy thereof in a newspaper for at least thirty days prior to the day of such election.

B. The election shall conform with the general election laws of the state. The return of the election held in a county or school district shall be made to the board of supervisors, and, in any other case to the governing body or board of the municipal corporation within twelve days after the election.

C. The board of supervisors, governing body or board shall hold a special meeting on the first Monday succeeding the twelfth day after the election to canvass the votes cast and certify the result. The certificate of the result shall be prima facie evidence of full performance of all conditions and requirements precedent to holding the election.

D. The governing board or body shall file and record in the office of the county recorder a certificate disclosing the purpose of the election, the total number of votes cast and the total number of votes for and against creating the indebtedness, and stating that the indebtedness is ordered. Upon filing and recording the certificate, the governing board or body shall carry out the purpose of the election.

Arizona Revised Statutes, Section 35-455

Issuance and sale of bonds; call for election

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by § 35-454, issue and sell bonds in the amount authorized at the election.

B. The call for the election shall set forth the amount of each bond and the aggregate amount of the bonds, the rate of interest to be paid thereon not exceeding six per cent per annum, when the interest is payable, the number of years such bonds or any series thereof are to run from the date of such bonds or series and the purposes for which the money derived from the sale of the bonds will be expended. As amended Laws 1959, Ch. 51, § 1.

Arizona Revised Statutes, Section 35-458

Levy of tax for payment of interest and bonds

A. After the bonds are issued, the governing body or board shall enter upon its minutes a record of the bonds sold, their numbers and dates, and shall annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and shall likewise annually levy a tax sufficient to redeem the bonds when they mature.

B. Monies derived from the levy of the tax when collected shall constitute a fund for payment of interest and the bonds. The fund shall be kept separately and shall be known as the "Interest Fund" and "Redemption Fund."

QUESTIONS PRESENTED

1. Last term, in *Cipriano v. City of Houma,* 395 U.S. 701

(1969), this Court invalidated a Louisiana revenue bond election on the ground that only property taxpayers were allowed to vote. Presented for decision in the instant case is whether the holding in *Cipriano* applies to general obligation bonds, which, unlike revenue bonds, pledge the general ad valorem taxing power of the issuing body toward repayment of the bonds, and constitute an effective lien upon all taxable realty within the taxing district.

2. Assuming, *arguendo* that the decision of the lower court is to be affirmed, whether the holding should be prospective only from the date of this Court's decision.

STATEMENT OF THE CASE

On June 10, 1969, the City of Phoenix, Arizona, submitted to the persons who under Arizona law are qualified to vote in bond authorization elections, ten separate proposed bonding issues. The first two of these propositions were for revenue bonds, $53,900,000 for the municipal water system, and $58,900,000 for the municipal airport and related facilities. The other eight proposed issues were general obligation bonds. The purposes and amounts of the general obligation bonds were as follows: Sewer system, $37,000,000; parks and playgrounds, $9,000,000; municipal buildings, $1,000,000; fire department, $1,200,000; police and public safety buildings, $4,500,000; maintenance and service facilities, $1,500,000; sanitary land fills, $2,250,000; library, $4,000,000.

The constitutional and statutory provisions applicable to all bond authorization elections of incorporated cities and towns in the State of Arizona limit the right to vote in such elections to persons who are qualified electors and who are also real property taxpayers. Arizona Constitution, Article 7, Section 13; Article 9, Section 8. Arizona Revised Statutes, Section 9-523 and Section 35-455. These constitutional and statutory provisions apply to all

political subdivisions within the State of Arizona, and not just to cities and towns.

The plaintiff in this case, Emily Kolodziejski, is a resident of the City of Phoenix and a qualified elector, but was not a real property taxpayer on June 10, 1969. Accordingly, she did not vote in the bond election held on that date.

All of the propositions submitted to the electorate on June 10, 1969, were approved by a majority of the persons voting in that election.

The decision of this Court in *Cipriano v. City of Houma,* 395 U.S. 701 (1969), was handed down on June 16, 1969, six days after the City of Phoenix bond election. One week later, on June 23, 1969, the City Council canvassed the result of the election pursuant to A.R.S. § 35-454 C, and certified that each issue had carried.

The appellee filed this action seeking a determination that all provisions of the Constitution and statutes of the State of Arizona which require the ownership of property and the payment of taxes thereon as a condition of voting in bond authorization elections are in violation of the United States Constitution. The appellee therefore contended that the bond election held on June 10, 1969 was null and void, and sought injunctive relief against the issuance of any bonds authorized at that election.

The case was argued on the merits before a three-judge district court on a stipulated statement of facts. The lower court filed its per curiam opinion and order on November 25, 1969. On December 17, 1969 the court entered its formal written judgment from which this appeal is taken.

SUMMARY OF ARGUMENT

Last term, in *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), this Court held that the State of New York could not constitutionally limit the vote in school board elections

to persons who owned or leased real property, or were parents or guardians of school age children without establishing a "compelling state interest" for such limitation. *Kramer* further held that there was no compelling state interest which would justify the limitation in that case.

On the same day, in *Cipriano v. City of Houma,* 395 U.S. 701 (1969), this Court invalidated a Louisiana city revenue bond election on the ground that only property taxpayers were allowed to vote in the election.

Neither by their express language nor by necessary implication have the *Kramer* and *Cipriano* decisions overruled the general principle, laid down by this Court in a wealth of decisions, prescribing that "the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . ." *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 50 (1959) and that a legislative classification is constitutionally infirm only "if it rest[s] on grounds wholly irrelevant to achievement of the regulation's objectives." *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552, 556 (1947).

Because of its basic inconsistency with the general principles laid down by this Court in numerous decisions involving the powers of the states to prescribe voter qualifications, the compelling state interest test should be confined to *Kramer's* factual context. In *Kramer* this Court wisely refrained from overruling its prior decisions, and should not now do so. Absent the *Kramer* facts, therefore, the traditional principles should govern, and state voting requirements which reasonably relate to a proper state objective should be upheld.

Even if the compelling state interest test is determined to extend beyond the *Kramer* factual situation, the underlying reasoning of the *Kramer* opinion does not interdict a state scheme which limits

the vote in general obligation bond elections to real property taxpayers. The rationale set forth in *Kramer* is that traditional equal protection doctrine, permitting classifications which are reasonable and not arbitrary nor discriminatory, assumes "that the institutions of state government are structured so as to represent fairly all the people," 395 U.S. at 628, and that such a liberal test can not be permitted when the constitutional challenge is to legislation "which delegates decision making to bodies elected by only a portion of those eligible to vote. . . ." *Ibid.* It follows, *Kramer* reasoned, that "the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials." *Id* at 627.

Bond elections do not involve the "election of legislators and other public officials." Thus, the theoretical prerequisite for the more restrictive "compelling state interest" test articulated in *Kramer* is absent in bond elections. Therefore, whether the compelling state interest test is confined to the context in which *Kramer* arose, or whether it is given broader reach, it has no applicability whatever to general obligation bond elections.

Applying traditional equal protection principles to this case, there is a reasonable basis upon which states may limit the franchise in general obligation bond elections to those persons whose property is to be taxed for the purpose of repaying the bonds.

In the event that the decision of the lower court is to be affirmed, it is respectfully submitted that the decision should not be given retroactive effect. The issue of *Cipriano's* applicability to general obligation bonds was specifically left open by the *Cipriano* opinion. The same reasons for which the Court in *Cipriano* held that decision prospective only apply with equal force to general obligation bonds. Because of the potentially disruptive effect which a retroactive holding in this case might have upon municipal financing which has already occurred, any application

of *Cipriano* to general obligation bonds should apply only to bond authorization elections held after the date of this Court's decision in this case, or in those states whose statutes provide bond election challenge periods, after the statutory time for challenge has expired.

ARGUMENT

I.

Over a period of many years this Court has laid down the fundamental principles governing the right of the states to prescribe reasonable conditions under which citizens will be allowed to vote. In a unanimous opinion authored for the Court by Mr. Justice Douglas, in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), the relevant decisions of this Court were summarized as follows:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams,* 193 U.S. 621, 633; *Mason v. State of Missouri,* 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns." 360 U.S. at 50.

Involved in *Lassiter* was a challenge to North Carolina's literacy test. Obviously, there are some illiterates who are more intelligent, more interested in civic affairs, and generally better citizens and more able voters than many persons who can read and write. Nevertheless, literacy as a state-imposed condition for voting was upheld by *Lassiter* because such a requirement falls within the "wide scope for exercise of [state] jurisdiction" in these matters. 360 U.S. at 51.

Beyond all dispute, every state voting qualification works an unfairness on some individual when compared with some other individual. There are many persons whose twenty-first birthday occurs the day after election day, or who have not been residents of the state the required period of time, or who are illiterate or have a previous criminal record, who are nevertheless more in-

terested citizens and would make more intelligent voters than other persons to whom these limitations do not apply. Many of the resulting inequities are more important to the individual citizen — and have a more potent impact upon the total complex of his governmental interests — than property ownership as a prerequisite to voting in a general obligation bond election. For example, it is unquestionably more important to a resident of the City of Phoenix to vote in November for the City Council — which has power over the entire panoply of city policy matters, including the initial decision to request a bond authorization election — than to vote in a city bond election the following May. But if his twenty-first birthday falls in December, he cannot vote in November, notwithstanding the fact that he is more interested, informed, and conscientious than many who are over twenty-one years of age.

Inevitably, if the state is to prescribe voter qualifications, such individual inequities will result. In doubtless recognition of this fact, this Court has applied the same test to voter qualification requirements that it has applied generally to state schemes brought into question on equal protection grounds: those classifications which are reasonable, and which are not arbitrary, invidious, or discriminatory, are upheld. In general, requirements that voters be a certain age, residents of the state for a certain time, and able to pass a literacy test are reasonable, and do not violate the Fourteenth Amendment's equal protection guaranty. The same is true of property ownership qualifications to vote in general obligation bond elections. There may be individual inequities, but in general, there is a reasonable basis for the classification: one step in the overall determination to issue bonds is reserved to those persons whose property is to be taxed to repay the bonds, and is encumbered by the bonds.

The only exceptions to the otherwise unanimous voice of authority emanating from some 100 years of this Court's decisions

in the area of state qualifications for exercise of the franchise are the decisioins last term in *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969) and *Cipriano v. City of Houma,* 395 U.S. 701 (1969). We do not read *Kramer* and *Cipriano* to have affected a general repeal of the entire body of law represented by *Lassiter v. Northampton County Board of Elections,* 360 U. S. 45 (1959); *Pope v. Williams,* 193 U.S. 621 (1904); *Mason v. State of Missouri,* 179 U.S. 328 (1900); *United States v. Reese,* 92 U.S. 214 (1876) and others. Those cases, and the principle for which they stand, were neither expressly nor by necessary implication overruled or rejected by *Kramer* or *Cipriano.* Since the general principle was not rejected, the logical conclusion is that it remains intact except for the particular factual contexts in which *Kramer* and *Cipriano* arose.

General application of the "compelling state interest" test all across the spectrum of state voter qualifications would raise inordinate problems. One of the regrettable chapters of this Court's history is reflected in a series of decisions in which the Court attempted to apply what Mr. Justice Black has referred to as a "natural-law-due-process formula." (See Mr. Justice Black's dissent in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670, 675 (1966). During that period this Court effectively substituted its own judgment for that of the various state legislatures; it did so under the guise of constitutional interpretation. In the sphere of economic regulation, this approach to constitutional adjudication has, happily, been supplanted by an approach which permits the states to enact regulatory programs which are reasonably related to proper state objectives. *Nebbia v. New York,* 291 U.S. 502 (1934).

Extension of the compelling state interest test generally, to matters of state-imposed voter qualifications would effectively reintroduce that "natural-law-due-process formula." The oft-

quoted language of Mr. Justice Holmes dissenting in *Lochner v. New York*, 198 U.S. 45, 75, (1905) that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" has its counterpart in the present context. By limiting the range of state electives to those instances where the state has a "compelling state interest," the choices which a state may constitutionally make are so limited that the courts have effectively placed themselves in a position to substitute their own judgment for that of the legislature. The instant case provides an excellent example: who could say with confidence that it is any more irrational to prohibit an illiterate, but well informed person from voting for President of the United States — or a twenty-year-old from voting for the executive, legislative and judicial officers of his State — than to prohibit non property owners from voting on bonds which will be repaid from property taxes. These are the kinds of policy choices that legislatures are best qualified to make and that should be left to legislatures.

No one really knows what "compelling state interest" means in the present context, but under almost any view, if it proscribes property qualifications for voting in general obligation bond elections, it must also interdict such qualifications as age, residence, literacy, etc., as voting qualifications generally. Very simply, there is no *compelling* reason why a state should exclude all twenty-year-olds from voting. Or all nineteen-year-olds. Or all eighteen-year-olds. Or all illiterates or all short time residents. Nevertheless, these exclusions are reasonable, when applied to the populace as a whole. The only workable test by which the constitutionality of such decisions can be judged is the time-honored one, whether the choice is rational, and not arbitrary, invidious, or discriminatory. As Mr. Justice Black pointed out in dissent in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670, 673-674:

"A study of our cases shows that this Court has refused to use the general language of the Equal Protection Clause as though

it provided a handy instrument to strike down state laws which the Court feels are based on bad governmental policy. The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not "irrational," "irrelevant," "unreasonable, " "arbitrary," or "invidious." These vague and indefinite terms do not, of course, provide a precise formula or an automatic mechanism for deciding cases arising under the Equal Protection Clause. The restrictive connotations of these terms, however (which in other contexts have been used to expand the Court's power inordinately, see, e.g., cases cited in Ferguson v. Skrupa, 372 U.S. 726, at pp. 728-732) are a plain recognition of the fact that under a proper interpretation of the Equal Protection Clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act."

There is no constitutional difference between the bond election at issue in the instant case and any other general obligation bond election. The parties have stipulated that "The source of funds for the 1969-70 fiscal year shows $2,350,200 of the annual general obligation debt service requirements of $5,594,973 to be paid through levy of ad valorem property taxes, the remaining $3,244,733 to be paid from other sources." Stipulated Statement of Facts, No. X, Appendix 15. The fact that during one year the City of Phoenix had available sufficient excise tax revenues and elected to use part of those revenues for the purpose of retiring some of its bond obligations is without constitutional significance. The fact remains that the security for the City's general obligation bonds is the City's pledge that it will use its ad valorem property taxing power to repay the bonds. Thus, the effective lien which the bonds represent against all real property within the City is unaffected by the fact that part of the obligation in some years may be repaid through excise taxes. The only tax which the City is obligated to impose by reason of the bonds is a property tax. Use of

excise tax revenue is optional.[1] Moreover, even during the year covered by the stipulation, a very substantial portion of the general obligation debt service requirements was met through property taxes.

The parties have further stipulated that "Plaintiff does not pay real property taxes as aforesaid, however, the amount of money paid as real property taxes is a cost of doing business of the plaintiff's landlord and as such has a material bearing on the cost of the plaintiff's rental payments." Stipulated Statement of Facts, No. VI, Appendix, 14.

The fact that the plaintiff's landlord's real property taxes have "a material bearing on the cost of the plaintiff's rental payments" does not place the plaintiff — as a matter of constitutional equal protection requirement — in the same category with property owners who actually pay the taxes and whose property is subject to the lien of the bonds.

In the first place, the stipulation is that in the case of this one plaintiff, property taxes have "a material bearing." There is no stipulation and there is no evidence on the record that in all cases or even in the majority of cases, real property taxes are passed on to lessees. Neither is there any evidence concerning the extent to which they are passed on. The most that can be said is that

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[1] A.R.S. §35-458 provides in pertinent part that "after the bonds are issued, the governing body or board . . . shall annually levy and cause to be collected a tax . . . upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and . . . to redeem the bonds when they mature." *Allison v. City of Phoenix*, 44 Ariz. 66, 33 P.2d 927 (1934) held that if a city has money available from another source "it may from time to time be transferred to the interest and redemption funds created by the statute . . . ." 44 Ariz. at 77. The Arizona Supreme Court in *Allison* clarified, however, that the predecessor of A.R.S. §35-458 "is mandatory and binding upon all parties mentioned therein, and that they must levy and cause to be collected a tax for the payment of bonds issued under such article, in the manner provided by such section." *Id.* at 74. Therefore, use of excise taxes to repay general obligation bonds is optional; imposition of ad valorem taxes for these purposes is mandatory.

there may be individual instances, such as in the case of Miss Kolodziejski, in which property taxes have "a material bearing" on rental payments.

Assuming *arguendo* that in a majority of cases within the City of Phoenix — as has been stipulated with regard to Miss Kolodziejski — the landlords' real property taxes have " a material bearing on the cost of the [lessees'] rental payments," the source of funds for paying any given year's property taxes is not the sole factor — or even the most important — which must be taken into consideration. The obligation to make rental payments is a less permanent and more revocable financial commitment than ownership of real property. The impact of general obligation bonds in the usual case is a long range commitment[2] and the lien resulting from these bonds is of similar permanence. A.R.S. § 35-458 provides that a tax *shall* be levied annually sufficient "to pay the interest on the bonds when due" and to "redeem the bonds when they mature." Thus, the bonds become a lien upon all taxable property within the issuing municipality, because all property taxes constitute a lien on the property. A.R.S. § 42-312. This is a lien which remains with the property for the life of the bonds. If the owner of the property attempts to sell the property he must sell it subject to this lien. The lien, therefore, attaches to the property and necessarily affects the value of the owner's interest in the property. General obligation bonds have no corresponding impact upon the interest of lessees. Lessees may come and go, but the lien of the bonds remains a burden on the property throughout the life of the bonds — in the instant case, 21 years from the date of issuance of each series.

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[2] In the election here at issue, for example, each of the general obligation bond propositions approved by the voters provided that the term of each series of bonds was to be twenty-one years. These bond propositions are contained in the City Ordinance ordering the election, Ordinance No. S-4747, a copy of which is included in the original record on appeal in this case.

Both from a legal and also a practical standpoint, the status of the real property taxpayer in a general obligation bond election is analogous to that of a person who encumbers his property as security for a loan. Assume, for example, that A and B become joint obligors on a promissory note, which is secured by a mortgage on property belonging only to A. A and B do not have the same interest in seeing that the loan is repaid. Both are personally liable, but only A's property is encumbered by the debt. In general, secured obligations can be obtained on terms more favorable to the borrower than unsecured obligations. Also, other things being equal, general obligation bonds can be marketed on terms more favorable to the issuing entity than revenue bonds.

Similary, assume that A and B are residents of the City of Phoenix, each with approximately the same amount of money to invest. A elects to live in rented quarters, and to invest all of his money in common stocks (or municipal bonds). B, on the other hand, invests his money in a home, or in investment real estate. So long as A remains a resident of the City of Phoenix he may or may not participate in the annual bond payments. Under any circumstances, however, he can completely free himself from all effect of the bonds by simply moving to the neighboring City of Scottsdale. Not so with B. For the life of the bonds his investment is encumbered by the lien of the bonds, whether he personally continues to live in the City of Phoenix or elsewhere. He may sell his real estate investment, but even then, the bond lien will affect the sales price.

If the City of Phoenix becomes indebted by reason of the issuance of general obligation bonds, all citizens may be affected to one degree or another by the bonded indebtedness. But the collateral security for the loan has been supplied only by the property taxpayers. Other citizens may live here for a time and then leave, taking their worldly wealth with them and leaving the bond obligations behind, but the real property which provides

the security for the bonds remains encumbered by the general obligation bonds so long as the bonds are unpaid. It is the long term lien on real property which places the owner of that property in a separate category from non-property owners.

Even more important, affirming the lower court on the basis that Miss Kolodziejski and presumably some but not all other renters in the City of Phoenix effectively participate in some portion of the annual bond payments, would propel this Court once again into the *Lochner v. New York* quagmire from which it had been assumed the Court extricated itself in *Nebbia v. New York*. As this Court pointed out in *Kramer*, there are persons such as Mr. Kramer who neither own nor lease property, but live with their parents, or other relatives, or whose property is for some reason exempt from taxation.[3] Attempting to identify which of these people the State may constitutionally subject to voter qualification requirements in general obligation bond elections and which of them it may not, and attempting further to lay down rules distinguishing among these various groups, involves the kind of line-drawing and decision-making that properly lies within the legislative, and not the judicial sphere. Certainly it lies within the power of the people of the State of Arizona in adopting a State Constitution, and within the power of their elected state representatives in enacting statutes, to conclude that there is a rational distinction between — on the one hand — persons who actually pay the tax and whose property is subject to the long-term lien of the bonds and — on the other hand — those who merely pay rent.

It is therefore submitted that no constitutional significance should attach to the fact that in Miss Kolodziejski's case there is a relationship of unspecified magnitude between property taxes

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[3] Arizona law provides, for example, that within certain limits property of widows and veterans is exempt from property taxation. Arizona State Constitution Article 9, section 2; A.R.S. §42-271 8.

and rental payments. As with all voter qualifications, it is possible to point to instances in which the scheme may work an inequity if certain individuals are compared with certain other individuals.[4] But the limitation in this case, taken as a whole, is reasonable. Considering the entire spectrum of voters and their interests in subjecting the City to long term debts to be repaid from property tax revenues over an extended term of years, it is reasonable to restrict the vote in general obligation bond elections to those whose property will be encumbered by the bonds and taxed to repay them.

II.

Even if the compelling state interest test is not limited to the *Kramer* factual context it should have no applicability to bond elections. Assuming the test set forth by *Kramer* to reach all elections within its potential scope, bond elections are nevertheless outside the ambit of the *Kramer* rationale.

The majority opinion in *Kramer* recognized that the compelling state interest test involved departure not only from traditional equal protection doctrine generally, but also from traditional equal protection doctrine applied in the voter qualification context. The reasons for this departure were set forth by the *Kramer* opinion:

> [T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the

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[4] As Mr. Justice Stewart correctly observed in his dissent in *Kramer v. Union Free School District:*

> "But such discrepancies are the inevitable commitant of the line-drawing that is essential to law-making. So long as the classification is rationally related to a permissible legislative end, therefore — as are residence, literacy, and age requirements imposed with respect to voting — there is no denial of equal protection." 395 U.S. at 637.

right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. 395 U.S. at 627-628.

The *Kramer* rule, therefore — and the reasoning underlying the adoption of that rule — have no applicability whatever to elections which do not involve "the election of legislators and other public officials."

The majority in *Kramer* reasoned that in identifying those persons who are to be entitled to select officials who govern and make policy, states were not to be given the latitude which they are otherwise permitted because the underlying assumption for such latitude is "an assumption that the institutions of state government are structured so as to represent all of the people." 395 U.S. at 628. Bond elections have nothing to do with the structuring of the institutions of government so as to represent all of the people, or with "election of legislators and other public officials." *Id.* at 627. Elections related to the structure of state governmental institutions are elections of people, such as the election in *Kramer*. The reason for the *Kramer* departure from traditional equal protection principles being totally non-existent in the bond election context, the *Kramer* holding is inapplicable to bond elections. Bond elections are governed, therefore, by the general rule, rather than the exception, and qualifications to vote in bond authorization elections should be upheld if reasonable.

Inapplicability of the *Kramer* rule to general obligation bond

elections is further borne out by the fact that such an election constitutes only one part of a three-part proceeding in the issuance and sale of municipal bonds. The first of these three steps is a determination by the governing body of the municipality that certain municipal improvements are needed, and that authority should be sought to issue bonds to finance these improvements. The second step is the election. The final determination as to whether the municipality is to become indebted, however, lies once again with the city council or other governing body, which must determine at which time the bonds are to be sold, if at all, and the rate of interest which they will bear. Therefore, both the initial decision and the final decision concerning the issuance of bonds are vested in the governing board of the municipality, elected by all qualified electors. In an analogous context involving voting rights, this Court has recognized and approved similar distributions of voting power among interested groups. In approving the Virginia Beach "Seven-Four Plan" in *Dusch v. Davis,* 387 U.S. 112, 117 (1967), for example, this Court stated as follows:

> The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside. Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is reversed.

Unless a century of consistent decisions by this Court are to be completely rejected — and they were not by *Kramer* and *Cipriano* — there is nothing unconstitutional about a system which vests both the initial decision to request authorization for municipal improvement projects, and also the final decision to issue bonds for these purposes, in a general governing body elected by both property owners and non property owners, while reserving the power to authorize the bonds in those persons whose property will be taxed in order to repay the bonded indebtedness.

The three step procedure involved in approving and issuing general obligation bonds — only the second of which is restricted to participation by property taxpayers — "reflects a detente between [property owner and non property owner] that may be important in resolving the complex problems of [municipal financing]," a detente similar to that which this Court in *Dusch v. Davis* held to be free from constitutional infirmity.

The rationale underlying the *Kramer* decision rests solely upon the inability of non-property taxpayers to elect the governing, policy-making body of the municipality involved — in *Kramer,* the school board; in the instant case, the city council. Since the theoretical underpinning of *Kramer* is necessarily absent in bond elections, the compelling state interest test, whatever its scope otherwise, is simply inapplicable to bond elections.

We recognize that passing references were made to "compelling state interest" in *Cipriano.* However, the references are bare dictum not essential to the decision, since, as the dissent by Mr. Justice Black and Mr. Justice Stewart observes, the voter qualification there involved was "wholly irrelevant to achievement of the state's objectives." 395 U.S. at 701.

The reasoning of the *Cipriano* opinion itself impels the conclusion that its holding should not apply to general obligation bonds. The opinion recognizes and assumes *arguendo* "that a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election . . . ." 395 U.S. at 704.

If the "specially interested" limitation includes anything at all, it must include property taxpayers in a general obligation bond election.

The two principal prototypes of municipal financing obligations are revenue bonds, such as were involved in *Cipriano v. City of Houma,* and general obligation bonds, such as are at issue in

this case. The *sine qua non* of general obligation bonds — and the single characteristic which distinguishes them from other bonds — is that the municipality which issues such bonds pledges its general ad valorem taxing power toward their repayment. Revenue bonds may be repaid either from the revenues derived from the assets financed by the bonds — such as the electric facilities in *Cipriano* — or from some other source, so long as the general ad valorem taxing power of the issuing municipality is not pledged toward repayment. It is generally true that, other things being equal, general obligation bonds can be marketed on terms more favorable to the issuing entity than non general obligation bonds.

General obligation bonds, therefore, unlike revenue bonds effectively place a lien for the life of the bonds on all taxable property located within the confines of the issuing municipality. Arizona Revised Statutes, Section 35-458 provides as follows:

"Levy of tax for payment of interest and bonds

A. After the bonds are issued, the governing body or board shall enter upon its minutes a record of the bonds sold, their numbers and dates, and shall annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and shall likewise annually levy a tax sufficient to redeem the bonds when they mature.

B. Monies derived from the levy of the tax when collected shall constitute a fund for payment of interest and the bonds. The fund shall be kept separately and shall be known as the 'Interest Fund' and 'Redemption Fund.' "

Taxes imposed on real property in Arizona become a lien on that property. A.R.S. § 42-312.

Thus, during the entire life of the bonds; the realty of the real property taxpayer is irrevocably burdened by the pledge — and the statutory obligation — of the municipality to utilize its taxing

power for the purpose of repaying the bond obligation. In *Baker, Watts & Co. v. Saxon,* 261 F. Supp. 247, 252 (D.D.C. 1966) the United States District Court for the District of Columbia observed as follows:

> "While there is a paucity of judicial authorities on the subject, it was held by the Supreme Court of Oregon, in City of Eugene v. Willamette Valley Co., 52 Or. 490, 97 P. 817, 821, that the phrase 'general obligations' means, 'a municipal debt, for the payment of which provision must be made by devoting funds raised by taxation, thereby appropriating in discharge thereof a pro rata share of the burden upon all property in a specified district that is subject thereto.' No authorities have been cited to the contrary."

At the very least, this much is clear: If a "specially interested" limitation is to be recognized — as indeed it should — the dividing line must be drawn between those instances in which the municipality pledges its property taxing power and those in which it does not.[5] If the "specially interested" limitation referred to by the *Cipriano* opinion means anything at all, it must include real property taxpayers in a general obligation bond election. There is no more clear example of voters being specially interested in the outcome of a bond election than voters whose property is encumbered by the bonds and constitutes the source of funds for their repayment.[6]

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[5] The effect of general obligation bonds on personal property is nominal by comparison to their impact on real property. There is no personal property tax applicable to household goods in Arizona. A constitutional amendment adopted by Arizona voters in the 1968 general election provides that "all household goods owned by the user thereof and used solely for non-commercial purposes shall be exempt from taxation . . . ." Constitution Article 9, Section 2. Personalty used for commercial purposes is subject to ad valorem taxation, but because of the exemption for household personalty, the personal property tax in Arizona occupies a very minor role in the overall ad valorem taxation scheme; it has no effect on the great majority of Arizona citizens.

[6] In other contexts this Court has recognized that the interest of taxpayers in public matters related to the expenditure of tax moneys may sufficiently outweigh the interest of the general citizenry to entitle such taxpayers to status which non taxpaying citizens do not enjoy. See *Flast v. Cohen,* 392 U.S. 83 (1968).

That the "specially interested" exception anticipated a distinction between general obligation bonds and revenue bonds is further strengthened by the following language in the *Cipriano* opinion:

> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." 395 U.S. at 705.

III.

For the foregoing reasons, it is respectfully submitted that *Kramer* should be limited to the factual context in which it arose. In any event, however — regardless of *Kramer's* scope otherwise — the compelling state interest test should not apply to municipal bond elections. Since limiting the franchise in general obligation bond elections to those persons whose property will be taxed in order to repay bond obligations is reasonable, the holding of the lower court should be reversed, and the general obligation bonds approved by the voters of the City of Phoenix at the election held on June 10, 1969 should be held free from constitutional defect.

In the event that the decision of the lower court should be affirmed, however, the decision should be given prospective effect only from the date of this Court's decision.

The reasons indicating a prospective application of any extension of the *Kramer* and *Cipriano* holdings to general obligation bond elections are the same as those which the Court set forth in *Cipriano* itself:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of

this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardships" by a holding of nonretroactivity. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). See *Chicot County Drainage Dist. v Baxter State Bank*, 308 U.S. 371 (1940). Cf. *Linkletter v. Walker*, 381 U.S. 618 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization. 395 U.S. at 706.

As reflected by several of the amici briefs which have been filed in this case, a number of general obligation bond elections have been held since June 16, 1969, in states which limit the vote in such elections to property taxpayers. Those elections were held in proper reliance upon this Court's express disclaimer that nothing was decided in *Cipriano* dealing with general obligation bonds. For the same reasons underlying the decision to make *Cipriano* prospective only, any extension of *Cipriano* to general obligation bond elections should apply only to general obligation bond elections held after the date of this Court's decision in this case, or in those states whose statutes provide bond election challenge periods, the ruling should apply, as in *Cipriano*, only where the challenge period has not expired.

Cipriano established as the effective date for prospective application of its decision, the date as of which "the time for challenging the election result has not expired . . . ." 395 U.S. at 706. Such a cut-off point was appropriate under the *Cipriano* facts, because Louisana has a statute which specifically provides for chal-

lenge to bond elections and further prohibits any judicial inquiry into the legality of the bonds once the statutory period has elapsed. Louisana Revised Statutes of 1950, Title 33, Section 4260.

Other states, including Arizona, have no parallel provisions. Arizona statutes do provide that election contest suits generally must be brought within five days after completion of the canvass of the election. A.R.S.§§16-1202 and 16-1204. Under the decision of the Arizona Supreme Court in *Morgan v. Board of Supervisors,* 67 Ariz. 133, 192 P.2d 236 (1948), however, there is question whether these statutes operate to preclude bond election challenges brought after expiration of the general five-day statutory election contest period. Therefore, in Arizona, and we suspect in other states, there is no identifiable time as of which the time for challenging the election results has expired.

Accordingly, it is respectfully submitted that in those states which do not have Louisiana-type bond election challenge statutes —with their concomitant provisions that any challenge not brought within the statutory time is forever barred — the Court should not set aside general obligation bond elections which had already been held prior to the decision in the instant case. In *Allen v. State Board of Elections,* 393 U.S. 544 (1969) this Court held that Section 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 et seq., required that certain changes in state election laws and regulations involved in *Allen* and other companion cases either be submitted to the United States Attorney General for approval, or a declaratory judgment action be brought in the Federal District Court for the District of Columbia. Notwithstanding its holding on the merits, the Court refused to set aside the elections involved. The Court observed as follows:

"Appellants in the Mississippi cases have asked this Court to set aside the elections conducted pursuant to these enactments

and order that new elections be held under the pre-amendment laws. The Solicitor General has also urged us to order new elections if the State does not promptly institute § 5 approval proceedings. We decline to take corrective action of such consequence, however. These § 5 coverage questions involve complex issues of first impression — issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of these statutes, if any, has not been determined by any court. We give only prospective effect to our decision, bearing in mind that our judgment today does not end the matter so far as these States are concerned." 393 U.S. at 571-572.

As in *Allen*, so also in the instant case, general obligation bond authorization elections are "not so clearly subject to" *Cipriano* that the failure to permit non property owners to vote in general obligation bond authorization elections constitutes "deliberate defiance" of the *Cipriano* holding. This is especially true where — as in the instant case — the election was held six days prior to announcement of the *Cipriano* decision. Any application of *Cipriano* to general obligation bond elections should therefore be held prospective only, that is, it should apply only to general obligation bond elections held after the date of the Court's decision in this case, or in those states whose statutes provide identifiable bond election contest challenge periods, the decision should apply only where the statutory time for challenge has not expired. Accordingly, the bonds approved at the June 10, 1969 bond election of the City of Phoenix should be valid.

CONCLUSION

For approximately one hundred years this Court has consistently informed the states that they are free to establish voter qualification requirements for their own citizens, so long as these require-

ments are reasonable. The learning contained in this century of decisions by this Court is sound, and should not be rejected now.

Moreover, whatever the scope of the holding in *Kramer v. Union Free School District*, the rationale of that case makes very clear that its holding has no applicability whatever to general obligation bond elections. *Kramer* by its own terms applies only to elections of people.

It is respectfully submitted that the judgment of the district court should be reversed.

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No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES A. JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, members of and constituting the City Council of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Appellee's Brief

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

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CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of Phoenix, Arizona,

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versus

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Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Appellee's Brief

SUMMARY OF ARGUMENT

I.

The Court should not, as Appellants argue, recede from the position adopted last term and restrict the rules set forth in *Kramer v. Union Free School District* and readopted in *Cipriano v. City of Houma* to the facts of those cases. The *Kramer* case specifically distinguishes voter qualifications from the right to vote in special elections. The Court applied the more stringent rule that in order to abridge basic freedoms, the state must show a compelling state interest. This rule should not be limited to revenue bond elections

nor elections in third-class school districts in New York but should be given general application throughout the Nation.

II.

In Part II, Appellants contend that the City's election meets the test set forth in *Kramer* and that the State of Arizona has a compelling state interest. It is the position of the Appellee that the state has not shown the compelling state interest, that the Appellee is just as interested in the outcome of the election as real property taxpayers and that the Appellee pays her share of the general obligation bond issue through her rent and the excise taxes paid to the City of Phoenix.

III.

Appellant's third point goes to the date for application of the *Cipriano* decision. Appellants argue that the *Cipriano* decision should be applied only after the date of the City's June 10th election. We counter with the argument that the date for application of the *Cipriano* decision in Arizona is the date for the canvass, the canvass having occurred after the *Cipriano* decision. The June 10, 1969, election of the City of Phoenix was not legally complete at the date of the *Cipriano* decision, and is specifically within the application of *Cipriano*.

I.

ARGUMENT

Appellants' position in Part I of its argument consigns both *Kramer*[1] and *Cipriano*[2] to oblivion by contending that the cases should be limited only to their factual situation. Appellants argue that the constitutional test of a state's action when depriving a qualified elector of the right to vote in a special election should be tested by the rational basis doctrine because that is

[1]*Kramer v. Union Free School District No.* 15, 395 U.S. 621; 89 Sup. Ct. 1886, 23 L.Ed.2d 583.

[2]*Joseph Q. Cipriano v. City of Houma, Et Al,* 395 U.S. 701, 89 Sup.Ct. 1897; 23 L.Ed.2d 647

the same rule applying to state laws which set voter qualification standards. Appellant contends that the compelling state interest test should not apply to general obligation bond elections and that neither *Kramer* nor *Cipriano* were intended to be precedent setting opinions. The Court should reject this argument. We believe that it is important that the *Kramer* opinion very carefully distinguishes between statutes setting general voter qualification standards and statutes which apply additional requirements as a prerequisite to voting in special elections.

> At the outset, it is important to note what is *not* at issue in this case. The requirements of § 2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age and residency requirements on the availability of the ballot. Cf. Carrington v Rash, 380 US 89, 91, 13 L Ed 2d 675, 677, 85 S Ct 775 (1965); Pope v Williams, 193 US 621, 48 L Ed 817, 24 S Ct 573 (1904). The sole issue in this case is whether the *additional* requirements of §2012 — requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections — violate the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws. *Kramer*, 23 L Ed. 2d at 588, 589.

The instant case has been limited solely to the question of whether or not general obligation bonds (as opposed to revenue bonds) may be submitted to a restricted electorate by placing the additional requirement precedent to voting that qualified electors must also be real property taxpayers.

Appellant's argument to return to the rational basis doctrine should be rejected.

The rule enunciated in *Kramer* might best be stated as follows:

While the states need only to show a rational basis to uphold

voter qualification requirements, having once qualified a person to vote under the general voting requirements, the state must then show a compelling reason before it can restrict the exercise of the voter franchise in any given election.

This is a good rule and does not upset past doctrines. It merely guarantees equal vote by all qualified electors except in the properly limited case where the state can show a compelling interest to restrict the vote to a lesser number than all qualified electors.

Secondly, *Cipriano,* paraphrasing *Kramer,* holds that the state, upon showing a compelling interest, must also separate those voting from those excluded so that none of those excluded are as interested as those allowed to vote.[3]

We believe Appellants' position that the Court limit both *Kramer* and *Cipriano* to their facts is not only unwise, it is also bad law. Having set a precedent in clear and certain terms in one year, the Court should not in the next year reverse its course. This is especially true when both *Kramer* and *Cipriano* are examined in the light of the words therein. As we shall show below, there is very little question that *Kramer* was meant to be a precedent setting opinion and *Cipriano* was an application of the *Kramer* doctrine to municipal bond elections.

Appellants state, and we agree, that the basic test of a state statute, vis a vis the United States Constitution, is generally the rational basis of the legislative act. However, the Court has made exception to this rule where certain basic freedoms are involved. That is to say, there are certain basic rights which, when infringed upon by any state act, causes the Court to apply a more stringent test.

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[3]Assuming *arguendo* that a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also "specially interested" in the election, whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on "whether all those excluded are in fact substantially less interested or affected than those the statute includes." 23 L Ed at 651

FREEDOM OF MARRIAGE AND PROCREATION

This rule was implied in *Skinner v. State of Oklahoma,* 316 US 535, 86 L Ed 1655, (1942), where the Court struck down a mandatory sterilization statute which applied after the defendant had been adjudged a habitual criminal. A man could not be adjudged a habitual criminal until he was found guilty of three felonies. The law included larceny as one of the crimes which were to be taken into consideration in a determination of the habitual criminal status. On the contrary, the crime of embezzlement was excluded from the list of felonies. Justice Douglas, speaking for the Court, held the crimes of larceny and embezzlement equal in nature and as the right of procreation was one of the basic civil rights of man, it was unconstitutional to apply the policy of sterlization against one act and not to apply it against all acts within the same lines, clearly implying that there was no compelling state reason to allow the state to take this action based on a certain type of criminal act when it didn't take the same action against all acts of equal criminal nature.

FREEDOM OF MOVEMENT

In *Korematsu v. the United States,* 323 U S 214 (1944), 89 L Ed 194, the Court upheld the Japanese relocation statute adopted during World War II. The Court said:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can, 323 U S at 216.

It is sufficient to say that the Court held World War II a compelling reason to allow the limitation on the defendant's freedom of movement.

RELIGIOUS FREEDOM

In *Braunfeld v Brown,* (1961) 366 U S 599, 6 L Ed 2d 563,

81 S Ct 1144, the Court held that although a Sunday closing law may place restrictions on freedom of religion of those whose religion sets a day other than Sunday as a day of worship, the countervailing feature of the statute giving one uniform day of rest for all of the citizens of the state was sufficiently compelling to allow the court to uphold the Sunday closing law.

However, in *Sherbert v. Verner,* 374 U S 398 (1963), 10 L Ed 2d 965, 83 S Ct 1790, the Court held a state statute relative to unemployment compensation invalid where it refused compensation to a worker (Seventh Day Adventist) who was discharged for refusal to work on Saturday. In this case, the Court stated:

> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. (374 US at 403)
>
> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," Thomas v Collins, 323 US 516, 530, 89 L Ed 430, 440. (374 US at 406)
>
> In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v Brown, supra. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive," 366 US, at 605. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case — a strong state interest in providing one uniform day of rest for all workers. The secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. (374 US at 408)

FREEDOM OF ASSOCIATION

In *Bates v. Little Rock,* (1960) 361 US 516, 4 L Ed 2d 480, 80 S Ct 412 the court held that freedom of association was a basic civil right which could not be infringed upon without the state showing a compelling reason. In this case the Court found forced disclosure of membership list in the NAACP under the requirements of an occupational license tax ordinance was violative of the 14th Amendment of the United States Constitution and that a mere rational basis for the ordinance was not sufficient. The state showed no "subordinating interest which is compelling"; the court struck down the ordinance. In this case, the Court said:

> Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. (361) US at (524)
>
> It was as an adjunct of their power to impose occupational license taxes that the cities enacted the legislation here in question. But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state actions threaten significantly to impinge upon constitutionally protected freedom it becomes the duty of this court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justifaction. (361 US at 525)

Thus the Court has over the years developed a test relative to the basic personal freedoms. When such basic personal freedoms are restrained by statutes adopted by the states, the claim of rational underpinning is not sufficient to uphold the statutes. The states must show a compelling reason for any limitation which affects such basic freedoms. Since *Baker v. Carr,* (1962)

369 U S 186, 7 L Ed 2d 663, 82 S Ct 691, and the myriad of cases which follow regarding voter rights, there can be no question that the Court now holds that the exercise of the franchise is guaranteed to the electors of the several states and that this right is one of the basic freedoms protected with a scrutiny which requires those defending any limitation or diminution of the exercise of the franchise to clearly show a compelling state interest. This is especially true since the decision in *Avery v. Midland* County, (1968) 390 U S 474, 20 L Ed 2d 45, 88 S Ct 1114, which applies the 14th Amendment to all elections at the state or local level.

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.
>
> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action . . ." Cooper v Aaron, 358 US 1, 17, 3 L ed 2d 5, 16, 78 S Ct 1401 (1958). Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government *are* the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law. 390 US at 479, 480

It is thus neither surprising nor unworkable to apply the compelling state interest test to special elections as the Court did in the *Kramer* and *Cipriano* cases and it is clear that the Court intended this rule to be applied to all special elections because the exercise of the franchise is to receive a greater protection because of the nature of the right affected. In *Kramer* the Court stated as much.

> And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legis-

lators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. 23 L Ed 2d at 589, 590.

But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. 23 L Ed 2d at 593.

The fact that the Court did apply this basic test in *Kramer* and immediately restated the same test in *Cipriano* is a clear indication that the cases were meant to be precedent setting.[4] Also the words themselves clearly imply that the cases were to affect all elections and not be applied only to a third-class school district in New York and city utility revenue bonds and that all other special elections were to be judged by some other standard. Therefore, we submit the following portions of the *Kramer* and *Cipriano* cases as evidence that the rules contained therein were clearly to be applied to all special elections.

And, in this case, we must give the statute a close and exacting examination. "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v Sims, 377 US 533, 562, 12 L Ed 2d 506, 527, 84 S Ct 1362 (1964). See Williams v Rhodes, supra, at 31, 21 L Ed 2d at 31; Wesberry v Sanders, 376 US 1, 17, 11 L Ed 2d 481, 491, 84 S Ct 526 (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. Kramer v. Union Free Sch. Dist., 23 L Ed 2d at 589.

Whether classifications allegedly limiting the franchise to those

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[4]This is especially important when it is noted that the lower Court upheld the Louisiana statute in *Cipriano* on the theory of rational basis. 286 F. Supp. 823, at page 826.

resident citizens "primarily interested" deny those excluded equal protection of the law depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Kramer v. Union Free Sch. Dist., 23 L Ed 2d at 592. The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a "rational basis" for limiting the franchise to those voters with a "special interest," the statute clearly does not meet the "exacting standard of precision we require of statutes which selectively distribute the franchise." Cipriano v Houma, 23 L Ed at 651, 652.

There is simply no rational reason in light of the foregoing to limit either *Kramer* or *Cipriano* to the facts contained therein.

II.

In Part II Appellants shift their thrust to argue that even if *Kramer* and *Cipriano* do apply to elections such as the City of Phoenix general obligation bond election, the City meets the test set forth in those cases and the election should be upheld.

This case concerns an election held in the defendant City seeking authorization to issue various bonds of the City of Phoenix. Two of the questions submitted to the electorate related to municipal revenue bonds (airport and water utility). The defendants have heretofore conceded that the revenue bond portion of the election is invalid because the election was restricted to real property taxpayers and not open to all qualified electors of the City.

The constitutional and statutory provisions are correctly set forth in Appellants' Jurisdictional Statement and need not be restated here. The main Arizona constitutional provision is Article 7, Section 13, which requires all questions on bond issues to be submitted to the real property taxpaying electors. This constitu-

tional provision has been held to apply to general obligation bonds but not to revenue bonds;[5] hence Appellants concession on the revenue portion was not inconsistent with their present stand on general obligation bonds.

The bond enabling statute under which Appellant sought authorization for issuance of the general obligation bond portion of its election is set forth in Title 35, Article 3, Section 3, Arizona Revised Statutes (a portion of this statute was ruled unconstitutional in the lower court's judgment).[6] It is important to note that the bond enabling statute is one of general application relating to the issuance of ad valorem tax supported bonds in the State of Arizona. It is in general the vehicle used for the issuance of most general obligation bonds in the state. The same general act is used by cities, towns, counties, school districts and all special districts unless the special district has its own integral bond enabling legislation.

The offensive portion of Title 35, Article 3, Section 3, Arizona Revised Statutes, is found in Section 35-455 (A).

§ 35-455. Issuance and sale of bonds; call for election

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by § 35-454, issue and sell bonds in the amount authorized at the election.

Similar language is contained in all other general obligation bond statutes within the State of Arizona. Hence, the effect of the

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[5] *Arizona State Highway Commission v. Gary Nelson, Attorney General,* 459 P.2d 509

[6] The Judgment reads as follows: "IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that . . . and Title 35, Section 455, Arizona Revised Statutes; are violative of the 14th Amendment of the United States Constitution insofar as said sections of the Constitution of the State of Arizona and statutes of the State of Arizona restrict elections to real property taxpayers who are qualified electors of the subdivision."

lower court's opinion effectively declared unconstitutional all general obligation bond statutes in the state "insofar as they exclude otherwise qualified electors from voting in the election."

In their Opening Brief, the Appellants entire basis for reversal of the lower court's opinion is the distinction between revenue bonds (as a generic term not necessarily limited to utility revenue bonds of the type mentioned in *Cipriano*) and general obligation bonds. There is a distinction, we agree, between the two types of bonds, but as we will show, the differences are not substantial enough to constitute a distinction of constitutional proportions.

It is important that we state the general distinction between revenue bonds and general obligation bonds. A revenue bond is sold and the proceeds are used to construct a revenue producing facility and the revenues received from the use of the facility are pledged for the repayment of the bonds. Generally, but not always, the facility must be self-supporting and the debt service on the bonds is paid after the operation and maintenance expenses of the facility.[7] Examples of revenue bond financing range from such gigantic operations as the New York Port Authority, Tri Borough Bridge Authority, the Golden Gate Bridge and mass transit operations such as the Bay Area Rapid Transit in San Francisco and are also used for local utility services such as power, water and gas utilities. We will also find that airports and athletic stadiums are usually constructed through the vehicle of revenue bonds.

Conversely, a general obligation bond is not sold with the intent of constructing a revenue producing facility nor is it necessary that there be any revenue from the project because the issuing body pledged funds to be received from ad valorem tax

[7]Certain type revenue bonds of the modern vintage use the so-called gross pledge which pledges the gross revenues of the district's revenue producing facilities. The bondholder is then paid first and the operation and maintenance charges are paid after the annual debt service on the bonds. If the revenues are not sufficient, the district must go to a tax levy or appropriated money from some other sources to pay the operation and maintenance costs. An example of this form of financing is the State Junior College Revenue Bonds, Section 15-696.01 and following, Arizona Revised Statutes.

(direct property tax) to be levied uniformly on all the taxable real property within the issuing district for debt service on the bonds.[8] Generally an Interest and Redemption Fund are to be set up and the issuing corporation will unqualifiedly pledge the proceeds received from the levy of taxes to the payment of the bonds. In Arizona, the Court has held that the bond holder is not allowed to look beyond the promise to pay the bonds by the levy of a direct ad valorem tax, that the sole security for the bonds is the levy of the ad valorem tax. However, the Court went on to hold that that opinion does not in any way stop the issuer from using any other funds legally available to service the bonds.[9]

Some special districts have hybrid forms of bonds pledging revenues of the district with a guaranty to fund the bonds from tax sources if the revenues fall short. See, for example, the Arizona law regarding hospital districts, Section 36-1242, Arizona Revised Statutes.

There are other types of municipal indebtedness such as short term warrants and long term lease purchase plans but revenue bonds and general obligation bonds make up the great bulk of the bond market. Of the two forms of bonds, general obligation bonds are by far the most prevalent. In Arizona the prevailing budget laws and constitutional debt limitation make general obligation financing the only source for raising large sums of money necessary for construction of new schools and municipal improvements.

It is further noted that two important stipulations obtain in this case. First, it has been agreed between the parties that Miss Kolodziejski's landlord will take the cost of real property taxes into consideration as a factor in determining her rent and secondly, Miss Kolodziejski is interested pecuniarly in the outcome of the election and is an interested citizen of the City of Phoenix wishing to take part in the civic affairs of the city and vote in all muni-

[8]See *Baker, Watts v. Saxon,* 261 F. Supp. 247, at page 252.

[9]*Allison v. City of Phoenix,* 44 Ariz. 66. at page 77, 33 P.2d 927.

cipal elections. In a sense, the Appellee is every person who rents property. It is beyond belief that the tenant does not effectively pay the cost of real property taxes borne by her landlord. It is further beyond the realm of common sense to believe that in every election there is not one qualified elector not a real property taxpayer "who will be as interested" in the outcome of the election just as and in the same manner as Miss Kolodziejski is interested. Therefore, we submit that the compelling state interest the State of Arizona seeks to articulate and protect by the limitation of the electorate to real property taxpayers is not a valid reason and is constitutionally impermissible.[10]

On of the main points in Kramer was that the electors voted on the district budget to be raised by a tax on real property. We see no difference here. The bonds require such tax. The only difference is that the period of time the bonds are to run is longer than an annual operating budget of a school district, but this is only a matter of degree.

It is further noted that Appellee pays excise taxes to the City of Phoenix and that a great portion of the annual debt service on the bonds has been paid through the vehicle of excise taxes. From every standpoint Appellee is both interested in and affected by this election. The lower Court, in applying the compelling state interest and substantial interest test, ruled there was no distinction between general obligation bonds and revenue bonds. This is a proper opinion and should be upheld by this Court. The Appellants' argument in the lower Court stated that the interest the State sought to promote was to protect the propery owner from the indiscriminate piling of debt against the property by those not required to pay the tax and that the restriction of the election sought only approval for the issuance of the bonds

[10]Actually the real property taxpayers true protection is the Arizona State constitutional debt limitation (Article 9, Section 8, State Constitution) which limits the debt to 4% of the value of the taxable property for general purposes and 15% for water, sewer and lights. This limitation has been held to apply to assessed valuation and hence constitutes only a percentage of the actual value of the property assessed. See Note 12.

from those persons actually primarily responsible for their payment. In a sense, Appellants argue, it is surely fair play to have those liable for the payment of the bonds make the actual determination as to whether the generally elected legislative body shall have authorization for issuance of the bonds.

Thus, Appellants argue that this being a compelling state interest, it is therefore within the bounds of the *Kramer* test to eliminate from the election all persons who are not property taxpeyers because they are not ultimately responsible for the payment of the bonds. This form of reasoning was not met with favor in the lower Court; it should not be favored here. The Appellants' argument is actually no different than the one set forth by the City of Houma stating that the property owner has a special pecuniary interest in the property and property value. The Appellants have not actually shown that those allowed to vote have any greater interest in the public improvements to be constructed from the proceeds of the bonds. In fact, it is admitted that Appellee is interested in the affairs of the City (Agreed Statement of Facts, Paragraph 5) and, as we have seen, she met the test for subjective interest or pecuniary interest. Furthermore, as we have shown, any increase in the real property taxes paid by Appellee's landlord will be reflected in her rent, thus passing the effect of any increase on to the Appellee. The Court, in the *Kramer* case, seemed to imply that the test of interest was a subjective one, that a person should be allowed to vote if he was interested in the affairs of the district. Appellee clearly pases this test, by stipulation. She further passes the test of pecuniary interest. Further, as pointed out by Justice Stewart in his dissent in *Kramer,* the term "interest" seems to be so broad as defined by the Court in the majority opinion that Appellee's mere desire to vote would be sufficient.[11]

The Stipulation of Facts shows that the cost of taxes paid by the landlord will be passed on the the Appellee. However, the present tax structure in the State of Arizona weighs more heavily

[11]Kramer dissent, 23 L Ed 2d at 597.

against Appellee than against a residential homeowner (which, of course, constitute the majority class of people allowed to vote in the election). A residential homeowner pays taxes assessed at 18% of the cash value of the property while an apartment owner pays tax which is based on 25% of the cash valuation of the apartment property.[12] As it is stipulated that the landlord's tax is passed on to the tenant, the Appellee is actually more affected by any increase in the ad valorem taxes than the residential homeowner who is the main class of person allowed to vote in the election.

Further the Appellee and all qualified electors pay a major portion of the debt service on Appellants' general obligation bonds from sales taxes. Although it is clearly optional on the part of the City, this shows that the Appellee can and probably will be charged a portion of the debt service on the general obligation bonds through the vehicle of sales taxes.[13] Clearly all persons who live within the City of Phoenix will have to pay the city's sales tax.

Appellee thus stands as a qualified elector clearly interested in and affected by the results of the Appellants election. The general obligation bond vehicle is the main source of capital funds for the City of Phoenix, and Appellee is just as needful of the civic improvements as her neighbors. The only distinction is that the neighbor may own property and pay taxes thereon. Thus we have a situation which is basically unfair. We have a situation where the Appellee is as interested as some real property taxpayers within the City. It probably would not be hard to find a real property taxpayer who owns a very small parcel of land and pays a very small amount of tax each year.

Here are some examples of the basic unfairnesses which may result.

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[12]Section 42-227, Arizona Revised Statutes, as amended; Section 42-136, Arizona Revised Statutes, as amended.

[13]Stipulation of Facts, Paragraph 10 thereof, shows that more than 50% of the debt service on the city's general obligation bonds came from sources other than ad valorem taxes.

1. A qualified elector could lease hundreds and hundreds of acres of land and effectively pay the tax through the medium of rent and not be allowed to vote in the election while another qualified elector could own one-square inch of taxable property and pay a few cents each year in taxes and have the unrestricted right to vote in the elections thus running up the cost of the debt service only to have this cost applied to the lessee of realty (keeping in mind that the articulated state interest is to prevent the converse of this situation).

2. One person may be the owner of all the real property in a political subdivision. Schools and municipal improvements may be needed to serve the population but the single real property taxpaying elector may refuse to vote for the needed bonds. This, of course, is pure feudalism. However, this type of situation is not beyond the realm of thought.[14] As a matter of fact, one man once claimed ownership of all of central Arizona, including the land where the City of Phoenix is now located, through a Spanish land grant in the name of his wife.[15] His claim was proven fraudulent but it clearly raises the possibility of an area of one million people or more not being able to make one improvement without the consent of a ruling family.

Arizona is still a frontier state in the sense that we have only two population centers in the sixth largest state in the Nation. Great areas of the state are sparsely populated. Company towns exist where all the real property is owned by a mining company (for example, Morenci). Fee land exists as islands in Indian

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[14]In the Peach Springs School District, Mohave County, Arizona, a general obligation bond election was defeated. 0 aye, and 1 nay. Source: Official canvass of the results of the election. The Appellee's attorney acted as bond counsel for the school district. We were informed that the single voter was the only real property taxpayer who was also qualified to vote.

[15]"*The Peralta Grant; James Addison Reavis and The Barony of Arizona*", by Donald Moore Powell, 1960, University of Oklahoma Press, Norman, Oklahoma.

Reservations. Often this fee land is owned by one family or one person, as in the instance of Peach Springs School District.

Obviously, these examples can apply to any state with similar restrictions. For the foregoing reasons, the lower Court's opinion should be affirmed.

Various commentators have discussed the problem raised by the *Kramer* and *Cipriano* decisions. The University of Pennsylvania Law Review, Vol. 117 at page 599 admits the property holder may have some more permanent interest "in the outcome of the election, but this crude generalization is a tenuous basis for an exclusion 'close to the core of our constitutional system.'"

In the Michigan Law Review, Volume 67, page 1260 at page 1265, we find the following:

> "In a case where financing involved increased property taxes, it might be argued that property owners would indeed be more likely to vote responsibly than those who do not own property. Nevertheless, when it is recognized that a property tax is generally not paid by property owners alone but is also passed on to the tenant, this argument becomes questionable. Without the assumption that property owners alone pay the property tax, there is no fundamental differences between property owners and non-property owners that would make the former more likely to vote responsibly in such an election. In short it is impossible to find any significant connection between the ownership of real property and the ability to exercise the franchise intelligently and responsibly."

and at page 1266 we find the following:

> "The property ownership requirements might still be justified, however, if it served to separate citizens with a substantial interest in the outcome of the election from those whose interest is not substantial. If the outcome of an election affects property owners alone or if it affects them to a substantially greater degree than it does others, property ownership qualifications do not violate the equal protection clause. But, it is clear that when the issue at stake in the election affects all citizens in much the same manner and degree, restricting the class of voters to property owners is arbitrary and can be unconstitutional."

and in Volume 87, No. 7, Harvard Law Review, at page 80, the commentator states:

> "A significant result of this reading of Kramer is that property qualifications simpliciter may no longer be acceptable eligibility test in such traditional areas as school millage or sewer assessment elections."

III

Appellants have taken the position that any decision by this Court should be prospective. Appellants' last contention is that the cut-off date for *Cipriano* should be the date of the city's election, and therefore, the election having been held prior to *Cipriano,* the theory of *Cipriano* in no event should apply to the city's bond election. We believe the Court should reject this back door approach to validation of the city's election. *Cipriano* was clearly prospective and would not apply where the authorization to issue the securities was legally complete on the day of the decision. However, the term "legally complete" clearly means the date of the canvass after which a certificate of result is recorded. Section 35-454, Arizona Revised Statutes, states "upon filing and recording the certificate the governing board or body shall carry out the purposes of the election." As we have set forth in Part I of this Brief, the Court in both *Kramer* and *Cipriano* ennunciated the doctrine which was to be applicable to all elections. It appears to us that any prospective application of any decision in this case would be based entirely upon the further discretion of this Court. Appellee, however, is sympathetic with the position of the various amici and therefore suggests that in order to prevent the disastrous results claimed by the Attorney General of the State of Texas that the Court rule that the general application of any decision rendered in this case be made prospective. Even though the subdivisions in the State of Texas may have disregarded the plain warning in the *Cipriano* case, the countervailing equities clearly favor that no action be taken to invalidate any bonds which have been issued under an erroneous reading of *Cipriano.*

SUPPLEMENTAL BRIEF

After submitting this brief to the printers and having received final proofs thereon, Appellee learned of the decision of the United States District Court for the Eastern District of Louisiana, New Orleans Division, in the case entitled *Frank T. Stewart, et al, Petitioners vs. The Parish School Board of the Parish of St. Charles, and School District No. 1 of the Parish of St. Charles,* No. 69-2818, Section E.

That decision like the instant decision was handed down by a three-judge panel.

The decision handed down by Judge Wisdom, Circuit Judge, declared invalid the constitutional and statutory provisions of the State of Louisiana restricting those voting in general obligation elections to property taxpayers. The Stewart case related to school bond elections but the court's decision clearly turned on the ability of the qualified elector to vote on general obligation bond elections and that there was no constitutional distinction between the qualified elector and the property taxpayer. Judge Wisdom cited from the case of *Turner v. Fouche,* decided January 9, 1970, reported in 38 Law Week 4090, and relied upon the statements in the *Turner* case to the effect that "what other objectives Georgia seeks to obtain its freeholder requirements must be secured, in this instance at least, by means more finely tailored to achieve the goal.".

Judge Wisdom noted that the fact that the school bonds are paid from ad valorem taxes is not a sufficient distinguishing feature. "True, the school bonds are secured by ad valorem taxation. Property taxpayers are faced with additional taxes for the years authorized by the bond issue; they are subject to having a lien on their property for the life of the issue. But if protection of the property taxpayer had been the legislature's chief interest, the law would not have excluded business entities. These are the taxpayers who pay the largest share of taxes in most voting districts."

Finally, Judge Wisdom stated:

> "It is conceivable that in a small rural school district a handful of taxpayers would have the veto power over public school improvements. In any voting district, the small homeowner would have his vote diluted. At this point in history, this is an intolerable discrimination. In short, we hold in favor of the plaintiffs on both issues. The special interest property taxpayers have in bond elections is not the compelling State interest that would justify excluding a large portion of the electorate that has a substantial stake in public education."

Respectfully submitted,

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No. 1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

CITY OF PHOENIX, ARIZONA, et al.,
Appellant,

versus

EMILY KOLODZIEJSKI,
Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE STATE OF LOUISIANA
AS AMICUS CURIAE

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, et al.,
Appellants,

versus

EMILY KOLODZIEJSKI,
Appellee.

On Appeal from the United States District Court for the District of Arizona

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BRIEF FOR THE STATE OF LOUISIANA, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of the State of Louisiana, and is sponsored by its Attorney General, the chief legal officer of the State, under Rule 42(4) of the Rules of the Supreme Court of the United States.

The State of Louisiana, whose political subdivisions finance the bulk of their public improvements through the issuance of general obligation bonds, has a real and substantial interest in the outcome of this case. This is

true because the Louisiana Constitution and Statutes require such bond issues to be approved by a majority of the property owning taxpayers, both in number of votes cast and amount of assessed valuation voted.

Having a so-called "limited franchise" voting law with some similarity but not identical to the Arizona law, the impact of the Court's decision in this case will undoubtedly be felt in Louisiana. There are, however, significant differences between the Louisiana law and the Arizona law. A decision which did not recognize such differences could destroy the integrity of a vast volume of public bonds in Louisiana, and irrevocably damage the confidence of investors in such type of bonds at incalculable cost to Louisiana taxpayers and the investing public. Therefore, the State of Louisiana feels compelled to call these differences to the attention of the Court.

Louisiana seeks to have the Court sustain the validity of Arizona's property bond election laws despite the differences that exist between the laws of that State and the property bond election laws of Louisiana. Pretermitting these differences, under Arizona law there is a substantial distinction between the obligation of the owner of real estate for the payment of the specific bonds involved and the other taxpayers. This distinction justifies a classification which limits to the owners of real estate the right to vote on bonds secured primarily by taxes on such real estate.

Whatever conclusion may be reached as to the merits of this case, the State of Louisiana is vitally in-

terested in having the Court reaffirm the doctrine of prospectivity with respect to decisions affecting debt obligations of public bodies and recognizing and upholding the peremptive period established by the Constitution and Statutes of Louisiana in accordance with this Court's recent decisions.

STATEMENT

The State of Louisiana, as amicus curiae, adopts the statement of the case appearing in the Statement by Appellant, City of Phoenix, Arizona, upon the jurisdictional question, as amplified by the stipulation of fact contained in the transcript of proceedings in the three-Judge Court below.

SUMMARY OF ARGUMENT

The summary of the argument in this brief is fairly stated in the foregoing showing of interest on the part of amicus curiae. Essentially, Louisiana is supporting the validity of Arizona's bond election laws as meeting the constitutional requirements for the limiting of an election franchise. Further, the Court should apply the equitable doctrine of prospectivity to any decision, the effect of which is to invalidate Arizona's limited franchise bond election law.

ARGUMENT

(1) Merits of Case.

The fundamental error in the decision below is in failing to recognize the basic distinction between gen-

eral obligation bonds, whether of Arizona or of any other state, and Louisiana revenue bonds, as were involved in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647.

Revenue bonds under Louisiana law are payable from and secured by the pledge of the revenues derived from the operation of the revenue-producing public utility constructed, acquired, extended and improved with the proceeds thereof, subject only to the prior payment of the reasonable, necessary expenses of operating and maintaining the utility. All users, both property owners and others, pay the rates for the services provided and the Court found in *Cipriano* that all electors are substantially affected and directly interested in the outcome of an election to authorize bonds payable from the revenues of such a public utility.

Per contra, as to Louisiana property tax bonds, they are secured by "unlimited ad valorem taxes" levied against all property subject to State taxation. There is no limit to either the dollar amount of taxes or millage which may be levied against assessed property for the payment of principal and interest on such bonds. The direct responsibility for payment of such taxes is upon that class of electors who are property owners.

Special taxes necessary to meet debt service requirements for the bonds are separately levied, collected, deposited, and paid out in a fund that cannot be legally diverted to any other purpose, and no commingling of tax money with general fund money is permitted. The taxpaying voters primarily interested are

exclusively subject to the payment of all the taxes required, and to the seizure and sale of their property if the taxes are not paid.

It is readily apparent from the foregoing that there is a vast difference between the revenue bonds considered in *Cipriano* and the general obligation bonds as considered by the lower court in this case. This difference or distinction justifies the establishment of a classification which limits to property owners the right to vote on bonds secured by property taxation.

Consider also the distinction between the law and the facts governing the so-called ad valorem bonds involved in the present case, and the law and the facts governing the ad valorem bonds in Louisiana. Unlike the Arizona law where the tax to support the bonds is restricted exclusively to real estate (Article 7, Section 13, Constitution of Arizona; Title 9, Section 782, A.R.S.), the provisions of Louisiana law pertaining to the subject of ad valorem taxes such as are here involved, provide for the taxation of both movable and immovable property, real and personal property.

The stipulation of fact relied upon by the three-judge court in the present case establishes the fact that the plaintiff also paid "excise" taxes to the City of Phoenix on all items purchased within the said City of Phoenix that were subject to such excise taxes, and that these excise taxes, as well as any property taxes paid on personal properties, were commingled with a general fund out of which the City of Phoenix annually and historically paid the debt service, when due, upon its gen-

eral obligation bonds, including the bonds voted upon, and that for the fiscal year 1969-1970 only $2,350,000 of the annual general obligation debt service requirement of $5,594,973 was to be paid by levy of ad valorem taxes, with the remaining $3,244,773 to be paid from other sources, including the excise taxes.

Present amicus curiae believes that the reasoning of this Court both in *Cipriano, supra,* and in the companion case of *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, when interpreted in relationship to the law of Louisiana governing general obligation bonds, will justify the Court in holding that the exclusion of non-property taxpaying qualified electors in Louisiana is actually necessary to promote a compelling state interest.

In evaluating the present record as to the merits of the present case, amicus curiae respectfully submits that this Court should consider the long line of cases recognizing the distinction between "voter qualifications" in the election of public officials, as in the case of *Kramer,* and "voter qualifications" where the business or financial affairs of a municipal corporation are involved, as in the case of *Cipriano.* The Federal Constitution does not guarantee to an elector the right to participate in every decision affecting the affairs of a political subdivision. The political right of an elector is secured by permitting him to vote for officials exercising public authority, or for officials who may be invested under the law with the power to make appointments.

The system in Louisiana, with which this Court is familiar, fully demonstrates this fact; and that indeed was exactly what the Court was dealing with in KRAMER, supra, where the Court recognized the validity of a school board member who might be appointed by publicly elected city officials, but affirmed the political right of a qualified elector to vote where an election was required, despite the fact that under the state law he was denied this right, as he did not own a fee or a lessee right, directly or through a spouse, in taxable real estate, and was not a parent or guardian of a child "enrolled for a specified time during the preceding year in a local school."

In the *Kramer* case the Court was emphasizing the interest of any qualified elector in matters related to the administration of local school board affairs; including fiscal, academic and budgetary controls. On the other hand, where the incurring of debt and the issuance of bonds for public purposes is involved, the issue is not the exercise of political suffrage, but is the participation in the determination of the imposition of an additional tax on property. Whether the compelling state interest justifies a limitation of the voting franchise depends upon whether there is a rational and reasonable classification as will secure all qualified electors against invidious discrimination.

In its consideration of the political right which was involved in *Kramer*, this Court furnished the constitutional answer to the question of how the average voter's right is to be protected as to public or governmental affairs of any kind, whether he owns property

or not, by applying the "one man, one vote" right, or equal voice right where public officials of any kind are to be elected, and where, if appointed, the equal voice right in electing the official or officials who are empowered to make such appointment. On the other hand, in questions involving a proprietary right, the Court has indicated that a reasonable classification is permissible.

There was no reason to prevent the qualified elector from voting for the school board member in KRAMER simply because he did not have a direct interest in real estate or a direct interest in school children. As a qualified elector his right of political suffrage was sacred in securing to him the privilege of voting for any public official where the office was elective rather than appointive; and where his total interest in the school system was a constitutional political right under the Fourteenth Amendment.

There is no need to argue with the use of the language "compelling state interest" if we keep in mind the issue with which the Court was dealing in these two types of cases — the one political, and thus inflexible; the other proprietary — in determining what would constitute a rational or reasonable classification.

Cipriano was no more than an extension of a long line of decisions by this Court challenging and annulling under the Fourteenth Amendment a state statute where an unreasonable or discriminate classification of rights is involved, and where there is thus a denial of equal protection of the law.

In the case of *Stewart, et al. v. The Parish School Board of St. Charles, et al.*, Civil Action No. 69-2818 on the docket of the United States District Court for the Eastern District of Louisiana[1], decided on February 25, 1970, which struck down the Louisiana provision that property ownership is a qualification for voting at a bond referendum to authorize general obligation bonds as violative of the Equal Protection Clause, the three-Judge Court treated a voting right in a property bond election as being of the identical category as a voting right where a public office is involved. This extension of the *Cipriano - Kramer* doctrine ignores the fact that in both of those cases the Court left the door open as to any case such as the present case, where the primary interest of the parties might be different.

The Court again recognized that there could be a valid limitation of the franchise in the recent decision of *Hadley, et al. v. The Junior College District of Metropolitan Kansas City, Missouri, et al.* (unreported); decided by this Court on February 25, 1970, where the majority opinion dealing with a political election reiterated that the state may in certain cases limit the right to vote to a particular group or class of people. It is submitted that the instant case must be of the type to which the court was referring; it would be difficult, if not impossible, to conceive of any other situation in which there were a more reasonable basis for such a limited franchise election.

In the mass of information by the various parties in-

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[1]See Exhibit "A" for a complete copy of the opinion in this case.

terested in and possibly affected by the decision in this case, it would appear that there is one significant fact which may have been overlooked. In a property bond election the question is not whether there is a need for a specific public improvement or even whether the proposed improvement is good or bad. The question in a property bond election is whether a particular group (property owners) will consent to the imposition of a tax upon themselves to finance the acquisition of the proposed improvements. If the improvements are to be financed from current revenues or other sources, an election limited to property owners clearly poses constitutional problems; however, where the question is simply whether additional property taxes will be imposed to pay for public improvements, what could be more reasonable than submitting the question to those who will pay such taxes? If the election is defeated, this does not mean that the improvements will not be provided; it only means that the property owners alone are not willing to bear the total cost of improvements which admittedly will benefit the entire citizenry but that some other means of financing the project must be developed.

(2) Doctrine of Prospectivity

There are important differences between the laws of Arizona and the laws of Louisiana with respect to the time within which an election may be contested. These differences must be considered by the Court in determining the question of prospectivity in the application of any judgment of the Court which would invalidate Arizona's property bond election laws and which action

could perhaps affect similar laws of other states. The Arizona Revised Statutes, Sections 16-1202 and 16-1204 provide that an "elector" may contest an election held in a County, City, Town or political subdivision thereof and provide that the contest must be begun within *five days* of the canvass and declaration of the results of the election. Apparently the admittedly short five-day prescriptive period of Arizona law was ignored by the Court below in the instant case, but even if this prescriptive period is not a full-fledged peremptive period, there was no justification for the Court to apply the June 16, 1969, date of the *Cipriano* decree as the cut-off date for the validity of property bond elections in Arizona instead of applying the equitable doctrine of prospectivity as was done by this Court in *Cipriano*.

Under Louisiana law (La. Constitution, Article XIV, Section 14(n) and Louisiana Revised Statutes 39:518), any person in interest has the right to contest such an election for a period of *60 days* from the date the official election returns are published in a local newspaper, after which time the cause of action or right of action ceases to exist. This could be as long as *80 or 90 days* after the promulgation of the election returns by the governing authority. The Supreme Court of the State of Louisiana has consistently held that the cited provisions of law constitute a peremptive period after which no court can entertain an attack for any cause, including Federal constitutional grounds. See *Andrieux v. Parish School Board of East Baton Rouge*, 227 So.2d 370 (Louisiana 1969). The same peremptive period was recognized and applied by this Court in the *Cipriano* case, and was recently discussed and applied by a three-Judge Court in the case of *Hobbs v. Police Jury*

of Morehouse Parish, United States District Court for the Western District of Louisiana, Shreveport Division, Civil Action No. 14836, decided on January 23, 1970 (unreported).[1]

In the *Stewart case, supra,* the Court correctly applied the equitable doctrine of prospectivity in the light of the Louisiana peremptive period by making its decree applicable ". . . only to elections held after the date this decision becomes final and to those elections held prior to such date that are challenged during the time specified by law for challenging the election."

Perhaps the most significant case with respect to Louisiana's peremptive period is that of *Chambers v. Road District No. 505 of Tangipahoa Parish, Louisiana, et al.,* October Term, 1969, No. 1131. After noting probable jurisdiction in the present case on February 24, 1970, this Court in the *Chambers case, supra,* denied a Writ of Certiorari on March 2, 1970. This was a Louisiana case in which the Supreme Court of Louisiana had barred an attack on the constitutionality of Louisiana's limited franchise election law for property bonds after the expiration of the 60-day constitutional and statutory peremptive period. The action of this Court thus sustained the decision of the Supreme Court of Louisiana in that case. It would be illogical for this Court to reverse itself, in effect, by making its decision retroactive in the instant case. The far-reaching harmful effect of such a retroactive application has been carefully documented in other briefs submitted by interested parties in this case.

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[1]See Exhibit "B" for a complete copy of the opinion in this case.

Thus, the material differences between the law of Louisiana and the law of Arizona insofar as property bonds are concerned, as well as the material differences between the property bond law of Louisiana and the revenue bond law of that State, as well as the wide variety of state laws governing similar bonds make it reasonable to assume that this Court will, if unconstitutionality is decreed, apply its decision prospectively.

CONCLUSION

The State of Louisiana respectfully urges the Court to uphold the validity of laws which restrict the voting franchise in general obligation bond elections to property owners on the grounds that such persons constitute a class of voters who have a direct interest in and are primarily affected by the outcome of the election and that the exclusion of non-property owners is necessary to promote a compelling state interest which, under our republican form of government, is essentially a matter reserved to the individual states for determination.

If the Court should affirm the decision of the lower court and in so doing invalidate state laws limiting the franchise in general obligation bond elections to property owners as a violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, the Court should give such decision prospective application only, following the equitable doctrine firmly established by this Court in recent cases.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel for Amicus Curiae, the State of Louisiana, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this ____ day of March, 1970

_____

Exhibit "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

FRANK T. STEWART, JOSEPH LEPINE, CAL BERRY, STANFORD CAILLOUET, SR., RAYFIELD LEWIS, EDDIE WILLIAMS, and GARLAND WEBER,
Petitioners,

vs. C.A. #69-2818
Section "E"

THE PARISH SCHOOL BOARD OF THE PARISH OF ST. CHARLES, AND SCHOOL DISTRICT NO. 1 OF THE PARISH OF ST. CHARLES,
Respondents

Filed: Feb. 25, 1970

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Melvin P. Barre, District Attorney
29th Judicial District, Edgard, La.,
J. Hugh Martin,
Harold B. Judell,
William P. Schuler, Assistant Attorney General,
Attorneys for Defendants.

Before WISDOM, Circuit Judge, and CASSIBRY and MITCHELL, District Judges.

WISDOM, Circuit Judge: This case involves the right to vote in a school bond election.

Louisiana laws, unlike the laws of thirty-six states, restrict eligibility to vote in bond elections to qualified voters who are "property taxpayers".[1] In such elections

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[1] "Municipal corporation, parishes and school, road, subroad, sewerage, drainage, subdrainage (waterworks and sub-waterworks) districts, hereinafter referred to as subdivisions of the State, may incur debt and issue negotiable bonds, when authorized by a vote of a majority in number and amount of the property tax-payers qualified to vote under the constitution and laws of this State, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to retire said bonds at maturity." Constitution of 1921, Art. XIV, § 14(a).

"Only property taxpayers qualified as electors under the constitution and laws of this State are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy". L.S.A.-R.S. 39:508.

Thirteen states, besides Louisiana, restrict voting in bond elections to property taxpayers: Alaska Constitution, Article V, Section 1; Arizona Constitution, Article 7, Section 13; Colorado Constitution, Article XI, Sections 6, 7 and 8; Florida Constitution, Article IX, Section 6; Idaho Constitution, Article VIII, Section 3; Michigan Constitution, Article II, Section 6; Montana Constitution, Article IX, Section 2; New Mexico Constitution, Article 9, Section 12; New York Local Finance Law, Section 33:10; Oklahoma Constitution, Article X, Section 27; Rhode Island Constitution, Amend. Article XXIX, Section 2; Texas Constitution, Article 6, Section 3-a; Utah Constitution, Article XIV, Section 3.

the affluence of the voter is made the electoral standard by a requirement *no other State* imposes on the electorate: Political subdivisions in Louisiana may issue bonds only if they are approved by a "majority in number and *amount of the property*" of the taxpayers who vote in the election.[2] These laws deny the vote to parents, lessees, and others who have a direct and substantial stake in public education generally and in the proposition put to a vote, but by necessity or choice do not own real estate in the political subdivision where the election is held.[3] By gearing the weight of each elector's vote to the amount of his assessed property the laws debase the vote of small landowners. We hold therefore that the exclusion of all non-property taxpayers and the dilution of the small property holder's vote violate the Equal Protection Clause of the Fourteenth Amendment.

* * *

The parties have stipulated the facts and have agreed to submit the case to the Court to be "disposed of on the

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[2]That is, "their votes must represent a majority of the assessed property owned by those taxpayers who are actually voting". Cipriano v. City of Houma, 1968, 395 U.S. at 703, fn. 2.

[3]We take judicial notice of the fact that in Louisiana few individuals pay any personal property taxes; those who do pay a nominal tax usually based on the value of their automobile. Louisiana law, however, provides that "all properties situated — within the state . . . shall be subject to taxation". L.S.A. R.S. 47:1951-1956. Tax assessors in this state primarily place business, commercial, and corporate *personal* property (merchandise inventory) on the assessment rolls. Considerable personal property is exempt from taxation. Article 10, Section 4 of the Louisiana Constitution. In effect, the term "property taxpayer" equates with the term "real property taxpayer" or "landowner".

matter of the issuance of a permanent injunction, the parties waiving their respective interests to a hearing on a temporary injunction".

The St. Charles Parish School Board on September 23, 1969, conducted a special election to decide whether the Parish School Board should be authorized to issue bonds to the amount of $5,250,000 for capital acquisition and improvement of public schools in the parish.[4] There are 10,275 registered voters in the Parish; 7808 are white and 2421 are Negro voters. The election was hard fought, perhaps because residents on one side of the Mississippi River were at odds with residents on the other side of the River.[5] (All of the plaintiffs reside on

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[4]The proposition submitted to the resident property taxpayers of the School District read as follows:

> Shall School District No. 1 of the Parish of St. Charles, State of Louisiana, incur debt and issue bonds to the amount of Five Million Two Hundred Fifty Thousand Dollars ($5,250,000.00), to run twenty-five (25) years from date thereof, with interest at a rate not exceeding six per centum (6%) per annum, for the purpose of acquiring and/or improving lands for building sites and playgrounds, including construction of necessary sidewalks and streets adjacent thereto; purchasing, erecting and/or improving school buildings and other school related facilities within and for said School District, and acquiring the necessary equipment and furnishings therefor, title to which shall be in the public?

[5]An editorial from the St. Charles Herald, September 4, 1969, made part of the complaint, states: "Actually, the board plans to build one new high school on the West Bank. Any money left over will be used to build facilities at the GATX school that were supposed to be built at Norco, Destrehan and St. Rose out of money from the last bond issue. ¶ There is no doubt that the schools in St. Charles parish need the five and a quarter million dollars. ¶ There is also no doubt that the expenditure of this money in St. Charles by the present superintendent's office will mean that politics, not pure educational needs, will

the East bank.). Despite the public interest in the election, only 2,385 electors voted.[6] The official tabulation showed that 1,271 voters, representing an assessed valuation of $1,650,168.50, voted in favor of authorizing the bond issue; 1,114 voters, representing an assessed valuation of $1,261,310, voted against the bond issue. The bond issue was approved therefore by a majority of 157 votes in number presumably representing an assessed valuation of $388,858.30.

The plaintiffs brought this action on November 21, 1969, against the Parish School Board and School District No. 1, the sole and parish-wide school district in St. Charles Parish, to set aside the election and to enjoin the defendants from offering or selling the bonds.

The plaintiffs fall into two classes: (1) non-property taxpayers, who were ineligible to vote and (2) property taxpayers, who were eligible to vote but whose assessments were less than the assessments of others who voted in the election. In each class some of the plaintiffs have children enrolled in the public schools in St. Charles Parish; some do not.

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be served by the money." An editorial from the Herald dated September 25, 1969, states: "West Bank voters, who will receive almost all of the bond issue, voted to build a central high school on their side of the river. . . . No single precinct on the East Bank favored the bond issue."

[6] The record does not indicate the number of non-property taxpayers registered to vote in St. Charles Parish. The disparity between the total number of registered voters and the number of votes cast in the election suggests that a large number of registrants were ineligible to vote in the election.

I.

Certain principles stating voting rights apply to elections across the board. The one man, one vote canon of Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, is such a principle: it bars dilution of the franchise. Avery v. Midland County, 1968, 390 U.S. 474, S.Ct. , L.Ed.2d , extends the Reynolds v. Sims canon to subdivisions of a state including, of course, school districts. In Harper v. Virginia Board of Elections, 1966, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169, the court, striking down the poll tax, concluded: "[S]tate law violates the Equal Protection Clause ... whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.' . . . Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race ... are traditionally disfavored." These three decisions are basic to our conclusions in this case.

II.

Two recent decisions of the Supreme Court control this case: Kramer v. Union Free School District, 1969, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, and Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647.

In Kramer the Court considered a New York statute limiting the vote in local school board elections to parents and guardians of children attending public

schools in the district and to residents who owned or leased taxable real property. The defendants contended that parents and guardians constituted a group "primarily" interested in school affairs, an interest not shared by the public generally. In *Kramer*, as in the case before this Court, the School District and the State contended that property owners and lessees of taxable property had a special interest in decisions affecting public schools, since the funds for such schools were derived almost entirely from the taxes paid on real property. The three-judge district court held that restricting voting to these two groups was "rational" and "within the limits of the State's power to fix" qualifications for voting. The court characterized the election of a school board as a special purpose election, distinguishing *Harper* which involved a general election. 292 F.Supp. 70 (E.D.N.Y. 1968) on remand from 379 F.2d 491 (2nd Cir. 1967).

The Supreme Court, in a five to three opinion by Chief Justice Warren, held that the voting qualifications denied equal protection to the excluded voters. The Court pointed out, quoting from Reynolds v. Sims, that state statutory and constitutional provisions prohibiting the exercise of the voting franchise to some electors, while allowing it to others, must be "carefully and meticulously scrutinized"[7] to determine "whether the exclusions are necessary to promote a compelling state interest."[8] The Court found that the restrictions imposed by the New York statute "did not meet the exacting standard of precision we require of

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[7]395 U. S. at 626.
[8]395 U.S. at 630.

statutes which selectively distribute the franchise. The classifications ... permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions".[9] The Court said: "The issue is not whether the legislative judgments are 'rational'. A more exacting standard obtains. The issue is whether the ... requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class." Are those excluded "substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellants and members of his class is necessary to achieve the articulated state goal."[10]

In *Cipriano* the law under attack was identical with the pertinent provisions under attack in the instant case in that it gave only "property taxpayers" the right to vote in elections called to approve an issue of revenue bonds by a municipal utility. The district court accepted the argument that because of the "special pecuniary interest" property owners have in a utility system the classification was a "rational" one. On the facts, the Supreme Court might have held that the classification failed to meet the test of rationality. Instead, the Court reiterated the exacting *Kramer* standard: The "Court must determine whether the exclusions are necessary to promote a compelling state interest".[11]

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[9]395 U.S. at 632.
[10]395 U.S. at 633.
[11]395 U.S. at 704.

The voting restriction failed to meet that test.

In *Kramer* and *Cipriano* the Court declared that it was unnecessary to decide whether a state might in some circumstances limit the franchise to those "primarily interested". But the standard established in those cases cannot be confined within the contexts of a school board election, which the defendants characterize as a "political" election, and a revenue bond election, which the defendants characterize as "proprietory" in nature. Thus, in *Kramer* the Court said: "Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." 395 U.S. at 629.

Kramer and *Cipriano*, with the aid of Reynolds v. Sims, *Avery*, and *Harper*, teach that laws restricting the right to vote — we say, in any election — do not carry the usual presumption of constitutionality. In other situations, for example, a graduated tax, the defenders of a statutory classification have the light burden of finding that the legislative scheme has a rational basis.[12] Here they must meet "the exacting standard of precision" required of "statutes which selectively dis-

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[12] *Harper* and the redistricting cases presage "a preferred position for voting rights as key or fundamental rights, somewhat analogous to the special position now afforded to first amendment rights." A. Kaplan, Note, 4 Harv. Civ. Lib. L. Rev. 431, 442 (1969). The equal protection clause has a "positive aspect" in the area of voting rights. Note, 55 Va. L. Rev. 559 (1969).

"Equal protection requires a higher standard for classifications denying or diluting a citizen's vote than has traditionally been required for legislative classifications involving less fundamental political matters." Kramer v. Union Free School Dist., 282 F. Supp. 70, 81 (1968). (J. Weinstein, dissent).

tribute the franchise". Here the Equal Protection Clause is not satisfied by a finding that it was reasonable to recognize the special interest property owners have in a bond issue; the laws are unacceptable if they exclude non-property electors who have a substantial stake in the result of the election. It has been suggested that in *Kramer* the Court "conflat[ed] objective stake with subjective concern", signalling that, "even if a test could select for objective stake, it is not acceptable to exclude those concerned about the outcome even if they have no stake in the election.... A significant result of this reading of *Kramer* is that property qualifications *simpliciter* may no longer be acceptable eligibility tests, even in such traditional areas as school millage or sewer assessment elections.... It would make no difference that a community's tax structure was such that only property owners directly paid for such proposals. The Court's concept of 'interest' will not permit the exclusion of residents who do not own property, since they share a concern for and stake in the quality of the schools the young attend and the operation of the sewers which make the city habitable." Comment, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 80 (1968).

In *Kramer* the Supreme Court noted that the effect of the New York statute was to disfranchise "appellant and others who similarly live in their parents' home . . . (unless they are parents or guardians of children enrolled in the district pupil school); senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own or lease qualifying property and whose children

are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools". 395 U.S. at 630. These are all groups of persons who are excluded by Louisiana law from participating in any bond elections. Indeed, in a school bond election, Louisiana law is even more restrictive than the New York law which recognizes that lessees[13] and parents and guardians of children in public schools have, "objectively", a "direct" stake in school affairs. 395 U.S. at 631. Subjectively, parents and guardians have a special concern that the schools their children attend will be improved and properly maintained. They are in a position analogous to that of the non-property owners in Houma who pay utility bills and are directly affected by the operation of the utility systems. *Cipriano,* 395 U.S. at 705.

There is a recent sequel to *Kramer* and *Cipriano* involving the constitutionality of a Georgia law limiting school-board membership to freeholders. Turner v. Fouche, January 19, 1970, L.Wk. . "Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding can survive constitutional scrutiny", the Supreme Court held that the freeholder require-

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[13]The contention that in a bond election property taxpayers are more likely to vote responsibly than non-property owners rests on the assumption that only property owners pay the property tax. This assumption, is false, for the tax is passed on to tenants in the form of rent. "Contrary to popular misunderstanding, a renter pays just as much in property taxes as an owner, although it is hidden in the rent." C. Adrian & C. Press, Governing Urban America, 90 (1968). The transiency of tenants as a factor in determining interest is taken into account by residence qualifications for voting.

ment for membership on the county board of education amounted to invidious discrimination. "It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the board of education's own levy on real property. Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold. Whatever objectives Georgia seeks to obtain by its 'freeholder' requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal." Turner v. Fouche, , U.S. at .

There are obvious differences between the case before the court and *Kramer, Cipriano,* and *Turner.* It is significant, however, that in none of the cases did the Supreme Court recognize a constitutional difference between a general election and a special-purpose election. In the recent case of Kolodziejski v. City of Phoenix, Nov. 17, 1969, D.C. Ariz., F.Supp. , a three-judge court considered Arizona constitutional and statutory provisions limiting the electorate in bond elec-

tions to real property taxpayers.[14] The court could "find no evidence which would justify a distinction between Revenue Bonds and General Obligation Bonds". Going "no further" than *Kramer* and *Cipriano*, the court held that there was "no evidence" to "justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest". Contra: Settle v. City of Muskogee, Okla S.Ct. dec'd Dec. 23, 1969, No. 43,842; Settle v. Board of Commissioners, Co. of Muskogee, Okla S.Ct., dec'd Dec. 23, 1969, No. 43,812; Muench v. Martin Paine, S.Ct. Idaho, No. 10,552.

The State's compelling interest in fixing the qualifications of voters in school bond elections is to delegate to the voters in each school district the authority to improve public education in their district. That objective is certainly not promoted by excluding parents and guardians of school children and others who cannot be characterized as having a substantially less interest in public education than property taxpayers. In terms of the effect of the St. Charles election, the excluded groups may be more seriously affected than the taxpayers, many of whom may have a proper interest in avoiding arbitrary taxes but little or no interest in public schools. The State's objective of improving public education could, of course, be frustrated if a small minority of property taxpayers turned a-

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[14]The proposition voted on in the Kolodziejski case included both revenue bonds and ad valorem or general obligation bonds. The purpose was to improve water systems, airport facilities, sewer systems, parks and playgrounds, municipal buildings, fire, police, public safety, library, sanitary landfills, and maintenance and service facilities.

gainst the public school system.[13] That objective might also be frustrated if a majority of all voters reacted against public education. But a republican form of government, at least in today's world, rests on widening the suffrage and faith in the democratic process.

True, the school bonds are secured by ad valorem taxation. Property taxpayers are faced with additional taxes for the years authorized by the bond issue; they are subject to having a lien on their property for the life of the issue. But if protection of the property taxpayer had been the legislature's chief interest, the law would not have excluded business entities. These are the taxpayers who pay the largest share of taxes in most voting districts.

The presumption that property owners are more competent to vote in a bond election than non-property owners leads to irrational results. "It would disfranchise the president of a bank who happened to rent rather than own his own home."[16] All residents of a school district have an interest in public education.

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[15]The amicus brief of the Louisiana School Boards Association, however, makes the point that: 'The property owning citizens of Louisiana have consistently supported their local school systems in their communities by providing the capital improvement revenues needed to build, equip, and maintain the buildings in which the children must be housed in order to be properly educated. Historically, this burden of providing the buildings and equipment for the education of our children has been placed upon the shoulders of the property owning taxpayer. An examination of our sixty-six local public school systems will show clearly that the property owning taxpayers have willingly shouldered this burden in spite of opposition from segments of labor, conservatives, liberals and particularly against those who would pay no taxes at all.

[16]Note, 55 Va.L. Rev. 559, 566 (1969).

Here, for example, the general public interest must be weighed against allowing a particular private group to decide whether a public school be built and where — according to the School Board's pre-election announcements. The location of a new school may have a decisive effect on continuing or diminishing school segregation. In rural areas and in cities, to a lesser extent, the local high school is the focal point for community activities. Federal and state funds supply substantial aid to public education. All taxpayers contribute to these funds, but under the challenged law the decision to finance through a bond issue the construction of new schools and improvements of old schools is delegated to landowners.

Thirty-six states have not considered property a necessary qualification for voting in a bond election.[17] These states rely on checks and balances to prevent arbitrary and excessive taxation. Similar controls exist in Louisiana which make the exclusions unnecessary. (1) The Louisiana Constitution limits bonded indebtedness. La. Const. of 1921, Art. XIV., § 14. (2) Before a School District can call a special election to incur bonded indebtedness, the approval of the State Board and Tax Board must be obtained. La. R. S. 47:1804. The board is composed of the Governor, Secretary of State,

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[17]No state today has property qualifications for voting in general elections. XVII Council of State Governments, The Book of the States, 1968-69, 30 (1968). "In time [however] leveling influences prevailed, and most Americans refused to accept the contention that there was a necessary relationship between property ownership or payment of taxes and interest in government or capacity to govern. North Carolina, in 1865, was the last state to abolish property ownership as a qualification for voting in state and national elections . . ." Phillips, Municipal Government and Administration in America 175 (1960).

Attorney General, Legislative Auditor, and the Secretary of the Board appointed by the Governor. In National Bank of Commerce v. Board of Supervisors, 1964, 206 La. 913, 20 So.2d 264, the Louisiana Supreme Court pointed out that the Board has (a) the discretion and authority to prohibit the incurring of excessive debts, the levying of burdensome taxes, the excessive mortgaging of property and the excessive and unwarranted pledging of revenues in the interest of protecting the public fisc and the full faith and credit of the State and its political subdivisions, and (b) the function and duty to investigate and find the facts and circumstances affecting each individual case before deciding whether the application should be granted or denied.

It must also be kept in mind that the electorate, whether it be the property-taxpayer electorate, as now, or the general electorate as urged by the plaintiffs, has no authority under Louisiana law to initiate any proposal to incur debt or issue bonds. That initiating authority resides in the legislative process delegated to the parish and local school boards (and other political subdivisions with bonding authority). In this governmental process the basis for controls against any abusive assault on the property taxpayer is the responsiveness of elected officials, such as the school board members of the defendant board, to the will of the electorate as a result of having to offer themselves for election and reelection, and by being subject to recall.

III.

Other characteristics of the challenged Louisiana law demonstrate that it does not meet the exacting standards of *Kramer* and *Cipriano*.

The requirement that the bond issue be approved by a majority of the taxpayers voting representing a "majority of the assessed property owned by those taxpayers who are actually voting" apparently rests on the assumption, first, that property owners have a special pecuniary interest; second, that the larger the assessment the greater the interest and the greater the need to protect large property owners from irresponsible owners having no property. *Kramer* and *Cipriano* cut through the basic assumption. It is not enough to show that included groups have an interest. It must be shown that the exclusions are necessary to promote a compelling state interest. In terms of voting responsibly, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another.

The actual effect of gearing assessments to the vote is simply to dilute the participation of small landowners and to exaggerate the participation of large landowners in violation of the one man, one vote canon.[18]

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[18]Cf. Lance v. Board of Education of County of Roane, S.Ct. W. Va. 1969, 170 S.E.2d 783, reh'g denied. The Supreme Court of Appeals held, inter alia, that the three-fifths vote requirement of the West Virginia Constitutions and statutes dealing

In a small rural parish these effects are especially conspicuous. This is a type of invidious discrimination condemned in *Harper*: "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. . . . To introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor." 383 U.S. at .

Basing the vote on the tax assessment produces anomalous results stemming from the homestead exemption. A homeowner is entitled to an exemption of either $2,000 or $5,000 of the assessed value of his home, depending on whether he is a veteran.[19] Of course, a significant number of individual property owners enjoy this exemption and pay taxes only on the excess valuation. All of these homeowners are permitted to vote the full value of their assessment whether in fact they

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with bond elections was unconstitutional. The effect of the requirement is "to debase or dilute the weight or force of an affirmative vote when considered in relation to the weight or force of a negative vote." The Court relied on *Kramer, Cipriano,* and *Harper,* among other decisions. The Court said: "We are of the opinion that 'one person, one vote' principle is now firmly established in broad general terms without qualification or exception. Certainly the right of the voter to equal protection, the right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public revenue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government. ¶ We are unwilling to concede that a determination of issues such as those involved in this case cannot be safely entrusted to a majority of the voters."

[19] La. Const. of 1921, Art. X, § 4, para. 9, 9(a), 9(b); L.S.A.-R.S. 39:253.

pay little or no taxes. The result is that this group of homeowners vote but pay no more taxes than the plaintiffs who own no property.

The State reimburses school boards and other political subdivisions from the State Property Tax Relief Fund for the loss of taxes represented by the total assessed value of the homestead exemption. This fund is made up of the Public Utilities Tax,[20] the Alcoholic Beverage Tax,[21] and the State Income Tax.[22] Thus, a substantial amount of the voters' ad valorem property taxes is actually paid by the Property Tax Relief Fund.[23] All taxpayers, therefore, contribute to the property tax but only those who own assessed property may vote in school bond elections.

IV.

There are two constitutional issues in this case: first, the restriction of the franchise to property taxpayers; second, the requirement that the majority of the voters represent a "majority of the assessed property". Since the Court agrees with the Plaintiffs on the first issue, it might be said that it is unnecessary to

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[23] The homestead exemption is, of course, not a part of the law now being challenged. We should also point out that the Property Tax Relief Fund is under the legislature's control both as to sources of revenues deposited to its credit and eligibility to share in its proceeds. The plaintiffs do not attack the validity per se of voting homestead exempt property. They argue that the state's allowing such property to be voted demonstrates that the state's compelling interest here was not simply to protect "taxpayers".

[20] L.S.A.-R.S. 47:1009, 1010.

[21] L.S.A.-R.S. 26:460.

[22] L.S.A.-R.S. 47:284, 285.

reach the second issue. But the two limitations have been inseparable since 1898. Moreover, weighting the vote in favor of the large property owner points up the unsoundness of limiting the vote to property taxpayers. If this limitation were constitutional, the same arguments supporting its constitutionality would support basing the election on the value of a voter's assessment.[24] It is conceivable that in a small rural school district a handful of taxpayers would have the veto power over public school improvements. In any voting district, the small homeowner would have his vote diluted. At this point in history, this is an intolerable discrimination. In short, we hold in favor of the plaintiffs on both issues. The special interest property taxpayers have in bond elections is not the compelling State interest that would justify excluding a large portion of the electorate that has a substantial stake in public education.[25]

We hold that the general election laws of Louisiana are to be applied in general obligation bond elections; all qualified registered voters are entitled to vote in

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[24]Indeed, in their brief the defendants argue that the requirement of a majority in the amount of assessment is an "equitable voting procedure in an election whose participants are limited to property owners".

[25]In *Kramer* the Court noted that in school elections "objective" stakes are held by parents, future employers, neighbors, and in the sense that a nation's progress depends on its young, all citizens. The Court, however, also regarded "subjective" concern as relevant: "[A]ppellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election." 395 U.S. at 632, fn. 15. See Comment, 83 Harv. L. Rev. 7, 80 (1969).

such elections, as they are now entitled to vote in Louisiana revenue bond and sales tax elections.

We do not reach the question whether the secrecy of the ballot is a constitutional principle and that the method of voting assessments violates that principle.

V.

Significant hardships would be imposed on political subdivisions, bondholders and others connected with the financing of local government if our decision today was given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding injustice or hardship by a holding of non-retroactivity. *See* Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 and the authorities therein cited. Elections for approval of bonds and special taxes have been held in good faith by many public bodies as required by state law, and as a result budgets have been adopted and obligations incurred in reliance upon such elections. To upset these elections would disrupt orderly government and would not be in the public interest. Therefore, we hold that this decision should be applied prospectively: only to elections held after the date this decision becomes final and to those elections held prior to such date that are challenged during the time period specified by Louisiana law for challenging the election. Of course, our decision will not affect the validity of bonds or other securities which have been issued and are now outstanding.

JUDGMENT

IT IS ORDERED that Article 14, Section 14(a) of the Constitution of the State of Louisiana and Title 39, Section 508 of the Revised Statutes of the State of Louisiana are violative of the Fourteenth Amendment of the United States Constitution insofar as said provisions of law restrict elections to property taxpayers who are otherwise qualified electors of the political subdivision, and insofar as said provisions of law require the weighing of the vote cast in the amount of the assessed valuation voted.

IT IS FURTHER ORDERED that the special election held on September 23, 1969, pursuant to the resolution adopted by the Parish School Board of the Parish of St. Charles, acting as the governing authority of School District No. 1 of the Parish of St. Charles on July 28, 1969, and the same is hereby declared to be null and void and to have no force and effect.

IT IS FURTHER ORDERED that all of the Defendants, their successors, agents, or attorneys be and they are hereby permanently enjoined from taking any further action to advertise, issue, sell, or deliver any bonds purported to have been authorized by the said special bond election held on September 23, 1969, and from levying any ad valorem tax under the authority of said election.

IT IS FURTHER ORDERED that this decision and decree shall operate prospectively as set forth in the Court's opinion (findings of fact and conclusions of law).

Dated: New Orleans, Louisiana,
This 25th day of February, 1970.

(Signed) JOHN MINOR WISDOM
UNITED STATES CIRCUIT JUDGE
(Signed) FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE
(Signed) LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

IVORY HOBBS

versus CIVIL ACTION
No. 14,836

POLICE JURY OF MOREHOUSE PARISH, ET AL.

STATE OF LOUISIANA, Intervenor

Filed: Jan. 23, 1970

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THREE-JUDGE COURT: Robert A. Ainsworth, Jr.
Circuit Judge
Ben C. Dawkins, Jr.
Chief District Judge
Richard J. Putnam
District Judge

OPINION

The favorable results of an election in Morehouse Parish, Louisiana, authorizing the issuance of bonds to be paid from ad valorem taxes on property in that Parish, for the purpose of enlarging a public hospital, were promulgated July 8, 1969. July 22, 1969, Ivory Hobbs, a resident of Morehouse Parish, purportedly brought this would-be class action to procure a judgment declaring unconstitutional the provisions of Louisiana law[1] which give only "property taxpayers" the right to vote in elections called to approve the issuance of municipal bonds to be funded solely from property taxes. The complaint also seeks other relief, including an injunction preventing the issuance of bonds authorized in the above election, which would result from a judgment as sought. Pursuant to 28 U.S.C. § 2284, a Three-Judge District Court was convened to consider and decide this case.

September 24, 1969, defendant Police Jury filed a motion for summary judgment, supported by the affidavit of the Registrar of Voters for Morehouse Parish, on the ground, *inter alia*, that Hobbs was not a reg-

[1]La. Const. Art. 14, § 14; La.R.S. 38:508; La.R.S. 33:4258.

istered voter and was a non-registered property owner and therefore had no legal standing to bring this action, either in his own right or as a member of the class he purported to represent, as required by Rule 23(a) of the Federal Rules of Civil Procedure.

On motion filed December 1, 1969, one member of this Court *ex parte* allowed to be substituted as party plaintiff one Louie Gene Simpson, the motion alleging that he was a non-property-owning registered voter of Morehouse Parish. However, one week later, December 8, 1969, Simpson filed an affidavit with this Court stating that he never had consented to his name being used as plaintiff in this suit, and that he desired his name to be withdrawn therefrom. December 15, 1969, defendant filed its motion in opposition to the substitution. Approximately three weeks after Simpson's request to have his name withdrawn as party plaintiff, January 5, 1970, Ollie Earlean Tennant petitioned this Court to allow her to intervene as party plaintiff in this action. No action on this motion to intervene has been taken until now by any member of this Court.

Defendant contends that to allow either Simpson or Tennant to enter this suit would be to constitute a new action which is barred by the provisions of Louisiana law.[2]

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[2]La. Const. Art. 14, § 14(n):

> "*Contest of bond issue or tax; time.* For a period of sixty (60) days from the date of promulgation of the result of any election held under the provisions of this section, any person in interest shall have the

These laws prohibit any person from contesting the validity of an election, called for the authorization and issuance of ad valorem tax-supported bonds, after sixty days from the date of promulgation of the results of such election. Here, as shown, the initial suit by Hobbs was within the sixty-day period but the attempted substitution of Simpson and intervention by Tennant were well beyond the sixty-day time limit.

Before reaching the merits of this case, or the Constitutional question sought to be presented, this Court must resolve the following issue: May a plaintiff, not a registered voter and a non-registered property owner, and consequently not a member of the class he seeks to represent, timely institute a class action to contest a Louisiana ad valorem tax bond election which will serve as a proper basis for a subsequently-substituted plaintiff or would-be intervenor who attempts to enter the suit long after expiration of the legal delay allowed by State law for contesting such elections?

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right to contest the legality of such election, the bond issue provided for, or the tax authorized, for any cause; after which time no one shall have any cause or right of action to contest the regularity, formality, or legality of said election, tax provision, or bond authorization, for any cause whatsoever. If the validity of any election, special tax or bond issue authorized or provided for, held under the provisions of this section, is not raised within the sixty (60) days herein prescribed, the authority to issue the bonds, the legality thereof and of the taxes necessary to pay the same shall be conclusively presumed, and no court shall have authority to inquire into such matters. The provisions of this section shall not apply to the City of New Orleans."

See also La.R.S. 39:518, to the same effect.

It is axiomatic that one who attempts to sue in behalf of members of a class must be a member of the class he purports to represent. *Hammer* v. *Campbell*, 358 F.2d 215 (5 Cir. 1966) cert. denied 385 U.S. 851; 2 Barron & Holtzoff, *Federal Practice and Procedure* § 567, at 308 (Wright rev., 1961). *Cf. Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Cf. Richard Johnson, Jr.*, v. *Georgia Highway Express, Inc.*, ___ F.2d ___, (5 Cir. 1969). See generally Wright, "Class Actions," 47 F.R.D. 169. Plaintiff Tennant contends that, while this may be so, timely institution of a suit which gives knowledge of the demand to the defendant, and in which proper service of process is made, is sufficient to interrupt prescription (a misnomer, as will be shown *infra*) so that a later substituted plaintiff or would-be intervenor may proceed with the action as if he had brought the suit timely himself. Tennant's counsel cite Louisiana laws and jurisprudence supporting her contention. Defendant reasserts its position by citing the following passage from Barron & Holtzoff, *Federal Practice and Procedure* § 451:

> "If the effect of an amendment is to substitute a new party for one originally named, it has been held to constitute a new and independent claim for relief which cannot be allowed after the statute of limitations has expired."

We note that this excerpt from Barron & Holtzoff was written before the 1966 amendments to the Federal Rules of Civil Procedure. In that year Rule 15(c), F.R.Civ.P., was amended to read, in part:

> "* * * An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, *within the period provided by law for commencing the action against him,* the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added.)

As noted in *Crowder* v. *Gordon's Transport, Inc.*, 387 F.2d 413 (8th Cir. 1967), the Advisory Committee note on the Rule 15(c) amendment states in part:

> "The relation back of amendments changing *plaintiffs* is not expressly treated in revised Rule 15(c) since the problem is generally easier. *Again the chief consideration of policy is that of the statute of limitations,* and the attitude taken in revised Rule 15(c) toward the change of defendants extends by analogy to amendments changing plaintiffs." (Emphasis added.)

From the above, it plausibly might be argued that commencement of a class action by a party without standing to sue would interrupt the running of prescription.

Counsel for all parties cite *Slack* v. *Stiner*, 358 F.2d 65 (5 Cir. 1966), to support their contentions. In that case, individual plaintiffs brought an action against defendants before the statute of limitations had expired. The defendants were on notice of the basis of the suit, but during the course of the trial the action was converted into a class action. The Court of Appeals for the Fifth Circuit held that there was no class action before the Court until after the statute of limitations had run, and consequently the plaintiffs who intervened after that time were not entitled to recover. However, as noted by plaintiff, the Court stated:

> "If, at the outset, the two suits had been class actions the question as to whether the suits were 'commenced' so as to toll the running of the limitation period might have been a difficult one."

Consequently, *Stiner* gives us little help.

All of the jurisprudence cited by both parties in support of their respective positions relates to cases dealing with statutes of limitations. In Louisiana, these time limits commonly are referred to as *prescriptive* periods. Though counsel have not mentioned it, we must note that the period of time involved in this case is what is known in Louisiana as a *peremptive* period. This characterization of the time limit for contesting the type of election involved in this case was most recently classified as a peremptive period by the Louisiana Supreme Court in *Andrieux* v. *East Baton*

Rouge' Parish School Board, 227 So.2d 370 (1969).[3]

As was said in *Succession of Pizzillo,* 223 La. 328, 65 So.2d 783, 786 (1953):

> "* * * The difference between prescription and peremption is that the former simply bars the remedy whereas, in the latter, time is made of essence of the right granted and a lapse of the statutory period operates as a complete extinguishment of the right."

See, further, discussion on this subject in 29 *La. Law Review* 230 and authorities therein cited.

Had this case dealt with a simple prescriptive period, we may have been inclined to hold that institution of a class action by an improper party interrupted the running of prescription so as to allow a later, proper plaintiff, with appropriate standing, to prosecute the suit. However, we here are dealing with a peremptive period which has as its two distinctive characteristics (1) the complete extinguishment of the right of action after the time period has run, and (2) as was said by Professor Joseph Dainow, in 29 *La. Law Review* 230, in his discussion of "peremption" or "forfeiture," ". . . there can be no — repeat, no — interference with the running of time; there can be no interruption by suit or acknowledgment, nor suspension for minority or for other reasons."

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[3] "We have strictly adhered to the view that the constitutional and statutory *peremptive* period operates as a complete extinguishment of the right to attack bond and tax elections." At pp. 370, 371 (authorities omitted). (Emphasis added.)

Consequently, we must hold that institution of this purported class action in behalf of Ivory Hobbs, who was not a member of the class he purported to represent, was not a sufficient basis upon which to allow a later substituted or intervening plaintiff to proceed with the action. Moreover, *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), on which counsel for Hobbs, Simpson and Tennant rely in this suit for relief on the merits, expressly held that the rule enunciated by that decision would be applied only when the time for challenging the election result has not expired under state law.[4]

The peremptive period established by the Louisiana laws noted is based upon the strongest considerations of public policy in that it is in the public interest to protect the fisc against uncertainty and to protect the bonds to be issued from attack after a reasonable time allowed within which to contest the validity thereof for any cause. Here, it is obvious that the moving force behind this law suit had ample persons from whom to choose as his nominal plaintiff within the peremptive period allowed by law to contest the election. No mem-

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[4] "Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940). *Cf. Linkletter* v. *Walker*, 381 U. S. 618 (1965). Therefore, we will apply our decision in this case prospectively. *That is, we will apply it only where, under state law, the time for challenging the election result has not expired,* * * *." At page 706 (emphasis added).

ber of the class allegedly harmed having contested the bond election timely, we therefore disallow the motion to intervene and grant defendant's supplemental motion to dismiss and for summary judgment, it being improper to reach the merits of this case.

There are three additional reasons for dismissal. First, as noted, and is uncontested, Ivory Hobbs was neither a registered voter nor a registered property owner when this suit was filed. Consequently, he was not a real party in interest and had no standing to prosecute this suit. Rule 17, F.R. Civ. P.; *United States of America* v. *936.71 Acres of Land, et al.*, ____ F.2d ____ (5th Cir. 1969). While plaintiff might contend, under the last sentence of Rule 17(a), F.R.Civ.P., that the suit was filed timely:

> ". . . No action shall be dismissed on the ground that it was not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objections for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Rule 17(a) F.R.Civ.P.,

still we must note the Advisory Committee notes to Rule 17 state that the above provision "should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made . . ." 28 U.S.C. Rule 17, Cum. P. P. Notes p. 5. We do not find either situation to be present here.

Second, it is settled law that an intervenor takes the case as he finds it, 2 Barron & Holtzoff, *Federal Practice and Procedure* § 593 at 359 (Wright rev. 1961); *General Insurance Co. of America* v. *Hercules Construction Co.*, 385 F.2d 13 (8th Cir. 1967). Since, as noted above, there is no proper suit before this Court, plaintiff Tennant has no suit into which to intervene.

Third, January 9, 1970, defendant filed with this Court the transcript of an interview between a member of the Morehouse Parish Sheriff's Department and would-be intervenor Tennant. That transcript reflects that Tennant never consented to have her name used as intervenor or plaintiff in this case. It also reflects that Tennant owns immovable property in Parish and therefore is not a member of the class on whose behalf this suit was filed.

Consequently, since we do not reach the constitutional question attempted to be presented, this three-judge Court must be and is hereby dissolved. The order granting substitution of Simpson as plaintiff is recalled, as having been issued improvidently, and is rescinded, and the motions to dismiss and for summary judgment are granted.

THUS DONE AND SIGNED, this 23rd day of January, 1970.

(Signed) ROBERT AINSWORTH
Circuit Judge
(Signed) BEN C. DAWKINS, JR.
Chief District Judge
(Signed) R. PUTNAM
District Judge

SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, et al,

Appellant,

versus

EMILY KOLODZIEJSKI,

Appellee.

On Appeal from the United States District Court for the District of Arizona

BRIEF FOR LOUISIANA SCHOOL BOARDS ASSOCIATION, AS AMICUS CURIAE

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IN THE

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---

BRIEF FOR LOUISIANA SCHOOL BOARDS ASSOCIATION, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

May It Please the Court:

The State constitutional property school tax embodied in Section 15 of Article XII of the Louisiana State Constitution, representing at the present time the State's contribution,

comprises a very small percentage of the total sum presently required in providing quality education in the State. At least 75% or more of essential funds are collected under the ad valorem or property bond laws of the State embodied in Article XIV, Section 14(a) of the State Constitution, supplemented by Section 10 of Article IX, the latter also in respect to the voting of property taxes for maintenance and operation and additional capital improvements.

The property-owning citizens of Louisiana have consistently supported their local school systems in their communities by providing the capital improvement revenues needed to build, equip, and maintain rapidly expanding facilities and, also, to provide teachers' pay, and other maintenance and operation as well as incidental capital improvement purposes.

Since 1898, the burden of providing this money, pretermitting limited Federal funds of recent years, has been placed upon the shoulders of the property-owning taxpayers, and the record of sixty-six local public school systems in the State will show clearly that the property-owning taxpayers have willingly shouldered this burden.

It is because of this history of responsible support for public education by these property-owning taxpayers that the Louisiana School Boards Association is interested in the issues involved in the present case, as is more fully stated below.

STATEMENT

Louisiana School Boards Association, a service organization whose membership is composed of representatives of

all sixty-six School Boards for the State of Louisiana, appearing as amicus curiae in the above-entitled case under Rule 43(3) of this Court, accepts the statement of issues embodied in the Stipulation of Fact relied upon by the Court below, as more fully explained in the brief filed by Appellee herein, and in the brief of the State of Louisiana, amicus curiae, filed herein.

Because of the urgency and limited time, and to avoid repetition, present amicus curiae adopts in full the position taken in the brief filed herein on behalf of the State of Louisiana both upon the merits of the case, and as to the equitable doctrine of prospectivity.

Present amicus curiae will emphasize the vital importance of Louisiana's property-owner, taxpayer qualifications in school bond and tax elections as these laws are or may hereafter be interpreted by this Court in the case of *Frank T. Stewart, et al v. The Parish School Board of the Parish of St. Charles, et al*, Civil Action No. 69-2818 on the docket of the United States District Court for the Eastern District of Louisiana,[1] decided on February 25, 1970, presently pending on appeal to this Court, as such issues may be adversely affected by any decree rendered herein invalidating the Arizona general obligation bond law.

Pretermitting the material differences between the Arizona law and the Louisiana law here under discussion, amicus curiae urges this Court to uphold the validity of the Arizona

---

[1] See Exhibit "A," Louisiana State Amicus Curiae Brief for a complete copy of the Opinion in this case.

law which restricts the voting franchise in general obligation bond elections to property owners of real estate on the grounds that such persons constitute a class of voters who have a direct interest in and are primarily affected by the outcome of the election, and that the exclusion of non-property owners is necessary to promote a compelling state interest, which under our Republic Form of Government is essentially a matter reserved to the individual states for determination.

Further, in the alternative, amicus curiae urges that if the Court should affirm the decision of the lower Court, such decision be given prospective application only, fixing a cut-off date subsequent to a final decree of this Court following the equitable doctrine firmly established by this Court in recent cases.

SUMMARY

The summary of the argument is largely a repetition of the foregoing showing of interest on the part of amicus curiae.

Despite the differences in the law of Louisiana and the law of Arizona, as fully developed in the brief of the State of Louisiana, the School Boards of this State are supporting the validity of Arizona's bond election laws as fulfilling the constitutional requirements for the limiting of an election franchise.

Further, and in any event, this Court should apply the equitable doctrine of prospectivity to any decision the effect of which is to invalidate Arizona's limited franchise bond election laws.

ARGUMENT

(1) MERITS OF THE CASE.

PROPERTY TAXES IN LOUISIANA ARE SOLE SUPPORT OF CAPITAL IMPROVEMENT REVENUES FOR PUBLIC EDUCATION.

Every dollar of revenue for constructing, equipping and maintaining school buildings must originate from a local property tax election.

The Federal funds available for such purposes are limited insofar as capital improvements are concerned, and there is no provision in the Constitution and laws of the State providing these dollars in any other manner than as stated, under a system of law that was embodied in the Constitution of the State in 1898, and that has prevailed without legal interruption since its inception.

The school authorities of Louisiana are concerned that there is real danger of a property taxpayer revolt at what will be regarded as the unfairness of invalidating long-standing State constitutional and statutory provisions so as to now permit non-taxpayers to participate in such elections and to impose taxes on property-owning citizens. This denial of equal protection of the law presents the greatest danger to the vital financing of public education that has ever faced the public schools in Louisiana, and if sustained by this Court, the cornerstone of public school finance will be in large measure denied all of the sixty-six public school systems in the State for an indefinite time to come.

In this critical era, the problems of school integration,

over-population, health, crime, war, and urban dilemma make new solutions and new scientific theories, and in some instances, almost revolutionary social, economic and political changes necessary.

This Court is, of course, aware of the many Federal Court decisions and Federal Government actions of recent years, and even recent weeks, imposing upon public school systems new and rigid requirements with regard to the operation of public schools in Louisiana, and in other Southern states.

The Louisiana School Boards Association and its officers, directors, and delegates assembled in recent convention have reaffirmed that Louisiana cannot survive, much less progress, without a top-flight system of public education for all of the children of the State, white and black alike.

These Louisiana school authorities, from the State Superintendent of Education down, are dedicated to this purpose, to fulfill all constitutional requirements in this respect just as prescribed by the Federal Courts. To do so is demanding, and will continue to demand, a more rapidly expanding capital investment rather than the hopeless chaos and confusion that would result without the advantage of the present laws.

This new day in respect to which the Louisiana school system is making as much progress as any other in the South or elsewhere has, of course, to some considerable extent, as in all of the other states, aroused antagonism and hostility on the part of some of the property owners. Even so, and despite this fact, the majority has remained steadfast in their fidelity to preserve a total public school quality educational program, and has shown willingness to provide essential funds at the

local level through property tax elections even when all other sources of income have failed.

The Louisiana School Boards Association is concerned that any decision which invalidates our present property owner-qualifications for local property tax and bond elections so as to permit non-taxpayers to impose taxes on those citizens who will pay the bill will add impetus to that movement that could result in both constitutional and statutory amendments which will eliminate or reduce local property taxation as a source of revenue for local public school systems.

The Louisiana School Boards Association is convinced that each and every school system in the State of Louisiana should be encouraged with special emphasis at this time to improve its school system, and to maintain the quality of education offered therein whenever it can and by whatever legal methods may be available. This Association is convinced that nullification of present laws will have exactly the opposite effect.

There can be no doubt that every qualified elector has an interest in the content and conduct of public education in Louisiana and the other states. Much has been made of this point as to the "general interest of all qualified electors" in the public school system in the *St. Charles* case, supra, and largely became the basis for the Court's "across-the-board" decision in that case.

The argument that all qualified electors are interested or should be interested in the public schools is undeniable, and as to this, and fully commensurate with these rights the Constitution and law of Louisiana affords every qualified elector

the right to vote for all of the school board members and school officials, or is afforded an equal voice in voting for public school officials who may be invested under the law with the power to appoint.

That indeed was exactly what this Court was dealing with in *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (no more, no less), where the Court recognized the validity of a school board member who might be appointed by a publicly elected city official, but affirmed the political right of a qualified elector to vote for a school board member where an election was required, despite the fact that under the state law he was denied this right, as he did not own a fee or a lessee right, directly or through a spouse, in taxable real estate, and was not a parent or guardian of a child enrolled for a specified time during the preceding year in a local school.

On the other hand, where the incurring of debt and the issuance of bonds for public purpose was involved, as in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, the issue was not the exercise of "one man, one vote" political suffrage, but rather depended upon rational and reasonable classification as would secure all qualified electors against invidious discrimination.

The distinction between the political right and the proprietary or governmental right is a well-defined line of demarcation that is not only plainly delineated in these two much misrepresented cases, but in the jurisprudence of this Court as far back as research may be pursued.

The incipiency of the idea of "one man, one vote" was initiated in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reyn-*

olds v. Sims, 377 U.S. 533 (1964). The recent case of *Hadley, et al v. The Junior College District of Metropolitan Kansas City, Missouri, et al*, decided by this Court on February 25, 1970, is the more recent exacting classification of all of the relevant cases. These cases were dealing with the political franchise of individual electors where public officials were to be elected, either where the direct right to vote was involved, as in *Kramer*, or where reapportionment to assure equality was required, as in *Wesberry*, *Reynolds*, *Hadley*, and other cases.

Cipriano, on the other hand, is plainly no more than an extension of a long line of decisions by this Court challenging and annuling under the Fourteenth Amendment a state statute where an unreasonable or discriminatory classification of rights is involved, and where there is thus a denial of Equal Protection of the Law.

In all of this, if you will, the compelling state interest and the exacting standard of precision actually enforced by this Court which would restrict or selectively distribute the franchise is to be emphasized, but only within the orbit of the rationale presented by the facts.

In multiple cases involving state taxation, and in multiple other cases involving the public fisc of the state this Court has permitted broad power to the states when it came to making reasonable classifications, and balking or drawing the line only where invidious discrimination against a particular class was involved. *Avery v. Midland County*, 390 U.S. 474 (1968).

The test has been aptly stated to be that a legislative

classification is invalid only ". . . if the classification rests on grounds wholly irrelevant to achievement of the State's objective." *Levy v. Louisiana*, 391 U.S. 68 (1968); Id. at 71; See also *Avery v. Midland County*, supra; *McGowan v. Maryland*, 366 U.S. 420, 425 (1960); *Kotch v. Board of River Port Pilot Comm'rs.*, 330 U.S. 552, 556 (1946); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

As stated in *Williams v. Rhodes*, supra, ". . . we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and interests of those who are disadvantaged by the classification."

A. Sutherland, *Constitutionalism in America* 508 (1965), put it like this:

> "In all the cases emerges the basic proposition that a majority of the human beings concerned will determine their political and economic fate."

To apply this test in any practical, workable manner, it is submitted that in a case like the present only the qualified taxpaying electors who are directly affected by the election results are concerned.

If this is what the Constitution anticipates in protecting the qualified taxpaying elector, it necessarily means that those who are not directly affected must be excluded, and this is the compelling state interest.

(2) DOCTRINE OF PROSPECTIVITY.

In the event of a decree in this case invalidating the Arizona bonds, the doctrine of prospectivity fully developed

and emphasized in the brief of the State of Louisiana is of special significance to the school systems of Louisiana, for the reasons shown.

In the *Stewart* case, supra, Judge Minor Wisdom and his District Judge associates found the property bond law of Louisiana unconstitutional, and decreed the invalidity of the specific bonds involved where the suit had been timely filed within the sixty-day period provided under Art. 14, Section 14(n) of the State Constitution.

The Court nevertheless out of its own equity jurisdiction correctly applied the doctrine of prospectivity, relating it to the reasonable sixty-day Louisiana peremptive period by making its decision applicable to similar bonds only as to elections "held after the date this decision becomes final, and to those elections held prior to such date that are not challenged during the time specified by law for challenging the election."

Prospectivity in that case, as in the *Cipriano* case, supra, was justified under the Court's inherent equitable doctrine of hardship recognized by this Court in *Linkletter v. Walker*, 381 U.S. 618 (1965), and in other cases, as well as in the later case of *Cipriano*, supra.

Admittedly, the distinctions between the law of Louisiana and the law of Arizona, and the other vital distinctions as between the revenue law of Louisiana and the property law of Louisiana emphasize that what this Court is called upon to do in the event the present property bond laws are annulled, is to give close scrutiny to the laws of each state in preserving and protecting what is referred to in *Kramer* and *Cipriano*

as the "compelling state interest," justifying and requiring where a new situation is presented the application of the doctrine of "non-retroactivity" to any succeeding case where there is substantial distinction in the state law under consideration.

If equity is what is governing here, and if the conclusion of the Court is in any respect similar to the "across-the-board" decision rendered by Judge Wisdom in the *St. Charles* case, supra, it would hardly seem necessary to say that in any case that may hereafter come before this Court involving a state property bond the same equitable doctrine is to be applied, unless such bond is manifestly of a category of similar state bonds where the Court has previously found invidious discrimination.

This Court is thus to be called upon to examine the constitutional and statutory law of each of the states as to the right of state political subdivisions to incur debt and to issue bonds of one kind or another in providing the needs of the essential state purposes.

The very complexity of all of this in what must amount to the abandonment of the "broad" scope previously accorded states by this Court in respect to matters of this kind makes it even more imperative that the equitable doctrine of non-retroactivity is to be applied to each case where there is any substantial variation in the state law, as shown.

Under the doctrine of rational and reasonable classification of the *Cipriano* case, supra, the "primary" interest of the property owners here must be recognized and enforced as was expressly anticipated in both *Cipriano* and *Kramer*.

Finally, if one is to assume that this Court is to take over in a sense the supervision of all the laws of the state pertaining to taxes and fiscal policies, abandoning the broad principles heretofore reserved to the states in matters of this kind, the laws of each state are to be examined, and in insuring some degree of continuity to vital state functions as liberal principles of prospectivity are to be applied as is possible.

CONCLUSION

Present amicus curiae respectfully urges this Court to uphold the validity of the Arizona laws which restrict the voting franchise in general obligation bond elections of the kind here involved to property owners for the reason that such persons constitute a class of voters, and the only class of voters in the State, who are burdened with a lien securing the payment of the bonds in principal and interest, and who, thus, have a direct interest in and are primarily affected by the outcome of the election, and that the exclusion of non-property owners is necessary to promote a compelling state interest which under our Republican Form of Government is essentially local, governmental business that is reserved to the individual states for determination.

If the Court should affirm the decision of the lower Court, and in so doing invalidate the Arizona State laws as a violation of the provisions of the Fourteenth Amendment to the Federal Constitution, it is respectfully submitted that the Court should make it plain that the ambit of its ruling is restricted to the laws of that state, and in any event, the Court should give such decision prospective application only

following the equitable doctrine firmly established by this Court in recent cases.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel for Amicus Curiae, Louisiana School Boards Association, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

This _____ day of March, 1970.

_____

SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1969

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EMILY KOLODZIEJSKI,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF ON THE MERITS FOR POUDRE SCHOOL DISTRICT R-1, LARIMER COUNTY, COLORADO, AS AMICUS CURIAE

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BRIEF ON THE MERITS FOR POUDRE SCHOOL DISTRICT R-1, LARIMER COUNTY, COLORADO, AS AMICUS CURIAE

I. AUTHORITY FOR FILING

In accordance with Rule 42 (4) of this Court, this brief is filed without prior consent. It is filed on behalf of Poudre School District R-1, Larimer County, Colorado, a political subdivision of the State of Colorado. It is sponsored by the authorized legal representative of the district.

II. INTEREST OF AMICUS CURIAE

In 1969 the Poudre R-1 School District determined that a substantial land acquisition, building and furnishing program had to be undertaken to fulfill its responsibility to pro-

vide adequate schooling for the children attending its schools. Since additional monies had to be acquired to undertake and complete the program, the District looked for a method available to it to generate those funds. The only method available pursuant to Colorado constitutional and statutory provisions was the issuance of *general obligation* bonds.

On June 16, 1969, this Court rendered its decision in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed. 2d. 647. In that case, Louisiana statutory provisions authorizing municipalities to issue *revenue* bonds only if approved by a majority of property taxpayers entitled to vote were held to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Also on June 16, 1969, this Court, in *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583, likewise held a New York statute limiting the franchise in certain school board elections to owners or lessees of taxable real property located in the school district involved, spouses of such owners or lessees, or parents or guardians of children enrolled for a specified time in a school of the district, violative of the equal protection clause. Both the *Cipriano* and *Kramer* opinions, however, assumed, without deciding, that a state might, in some circumstances, constitutionally exclude otherwise qualified voters who are in fact substantially less interested or affected than those voters to whom the particular franchise is limited. *Cipriano* at 704, 89 S.Ct. 1899 - 1900, *Kramer* at 632, 89 S.Ct. 1892.

Fully aware of the *Cipriano* and *Kramer* decisions a school *general obligation* bond election was scheduled and held in the School District on October 14, 1969. The election was limited to qualified taxpaying electors pursuant to the limitations of Article XI, Section 7 of the *Constitution of Colorado* and as defined by *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-1 (4).

The results of the election were duly canvassed and certified at a meeting of the board of the School District on Octover 15, 1969, and it was determined issuance of the bonds had been approved. A public sale of a portion of the bonds authorized was scheduled and advertised for December 8, 1969.

On November 17, 1969, the decision of the trial court in this case was announced. The three-judge panel's decision made no distinction between an election held to authorize *revenue* bonds, as had been held violative of the equal protection clause in *Cipriano,* and an election held to authorize *general obligation* bonds, as had not previously specifically been held violative of such clause by this Court. Further, the trial court gave its decision retrospective effect by making it apply from June 16, 1969, the date of the *Cipriano* decision.

Because of the great uncertainty cast on the validity of the *general obligation* bonds of the Poudre R-1 School District by the trial court's decision in this case, the December 8, 1969, sale was cancelled. Although the time for contesting the election by an excluded elector pursuant to Colorado law has long since passed, *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-12 (2), the marketability of the bonds is still doubtful because of the decision of the lower court here.

The School District's interest corresponds to the interest of the *City of Phoenix,* et al., in that both followed the only constitutional and statutory procedures available to them to authorize the issuance of *general obligation* bonds. The School District's interest further corresponds to the interest of the City of Phoenix in that the franchise in both cases was limited to otherwise qualified electors who would be directly responsible for repaying the bond debt and who could have liens placed against their property because of the issuance of the bonds. The School District's interest differs somewhat from the interest of the City of Phoenix, et al., however, because, unlike the practice followed by the City of Phoenix in repaying

the debt from monies generated by means other than property tax in addition to property tax sources, the School District, pursuant to Colorado statutes, can repay the debt only through real and personal property tax sources, *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-19.

III. SUMMARY OF THE ARGUMENT

A. There Is a Compelling State Interest Involved in Limiting the Franchise to Qualified Voters Who Are Also "Specially Interested" in *General Obligation* Bond Approval Elections.

This Court has long recognized that states may determine the conditions under which the right of suffrage may be exercised. This Court just last year in *Kramer* and *Cipriano* assumed that a state might limit the franchise to qualified voters who are also "specially interested" in the election.

As was explained in *Kramer* and *Cipriano,* if a state articulates a state interest to limit the franchise in a certain election to those who are "specially interested," this Court, on review, looks first to see if the classifications of otherwise qualified voters excluded are tailored to meet that articulated state goal. If the exclusions are necessary and the classifications are made with sufficient precision to accomplish the articulated goal, this Court next looks to see if the state interest promoted by limiting the franchise constitutes a compelling state interest.

Revenue Bonds are paid only from the operations of the utility involved; they are not financed in any way by property tax sources. *General obligation* bonds, conversely, are financed either wholly or in part by property tax sources.

Property taxpayers have a substantially greater interest in the outcome of *general obligation* bond elections than other electors who are not property taxpayers because the effect of a *general obligation* bond issue is to impose a lien on the taxpayers property for payment of the bonds. This "special

interest" of a property taxpayer in *general obligation* bond elections is in sharp contrast to the interest of all electors in *revenue* bond elections where property taxpayers and non-taxpayers alike are as substantially affected.

Colorado school district indebtedness can be created only by *general obligation* bonds. Colorado school district *general obligation* bonds can be repaid only from *ad valorem* school taxes levied on real or personal property within the district.

The status of Arizona municipal bond and Colorado school district bond constitutional and statutory law on the matter of exclusion of non-property taxpaying electors in *general obligation* bond elections is substantially the same. The Poudre R-1 School District submits that there is a compelling state interest to protect those who will have a lien placed on their property for the payment of a tax from being told they will have that lien by others who will not have it. Detailed argument on this compelling state interest issue is left to the parties themselves.

B. The Judgment Below Should Not Be Given Retroactive Effect.

In the *Cipriano* case last year, this Court applied prospectively only its decision holding non-taxpayer exclusions violative of the equal protection clause of the Fourteenth Amendment. This was done for the expressed purpose of avoiding the injustice or hardship of a holding which would apply retroactively on cities, bondholders and others connected with municipal utilities. In another case last year, *Allen v. State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1, this Court supported a holding to be applied prospectively only for the following reasons: first, because the issues were complex issues of first impression in this Court; second, because the issues were subject to rational disagreement; third, because the incorrect position of the losing party did not constitute a deliberate defiance of the law; and, fourth, because the

judgment did not end the matter as far as other situations to be determined in the future.

The decision of the Court below was founded upon two mutually exclusive grounds: first, that there was no evidence before it which would justify a distinction between *revenue* and *general obligation* bonds; and, second, that there was no evidence to support a conclusion that the franchise exclusions were necessary to promote a compelling state interest.

If this Court upholds the decision below because of the absence of evidence to justify a distinction between *revenue* and *general obligation* bonds, such a determination will forestall the necessity of this Court to reach the issue of whether or not the franchise exclusions promoted a compelling state interest. Such a determination then would leave intact and unmodified the assumption made in both *Kramer* and *Cipriano* that a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election. If this assumption means anything at all, it must mean that a state can, under proper circumstances, constitutionally limit the franchise in school *general obligation* bond elections to those qualified voters who alone will be burdened by the repayment of the bonded indebtedness.

Unlike the practice in Phoenix, Arizona, where other sources besides property tax sources can be relied upon for the payment of the bonds, in Colorado *general obligation* bonds of school districts can be repaid only from *ad valorem* taxes on real and personal property. This Court, therefore, should not render a decision which would terminate the matter to the detriment of those political subdivisions wherein a basis for distinction exists. These political subdivisions to this date should have the right to rely upon the announcements in *Kramer* and *Cipriano* that in proper cases they can constitutionally limit the franchise to qualified voters who are specially interested in the election.

If, on the other hand, this Court determines that there are distinctions between *revenue* and *general obligation* bonds, it will become necessary for this Court to reach and determine the issue of whether or not the franchise exclusions promote a compelling state interest. Thereupon, the scope and effect of *Cipriano* will be surpassed for this Court in *Cipriano* did not reach this second issue. Under these circumstances, rather than determining this case upon the *Cipriano* decision, this Court will be necessarily required to make a determination on complex issues of first impression in this Court - issues subject to rational disagreement.

If the lower court is upheld because the facts do not justify a distinction between this case and *Cipriano,* the decision here will not end the matter as to those political subdivisions wherein a basis for distinction exists. The decision should be given only prospective effect because franchise limitations in those political subdivisions where a basis for distinction exists would not constitute a deliberate defiance of any holding of this Court. If the lower court is upheld on the compelling state interest ground, the decision should be given only prospective effect because the question involves complex issues of first impression in this Court and because the issues are subject to rational disagreement.

IV. ARGUMENT

A. There is a Compelling State Interest Involved in Limiting The Franchise to Qualified Voters Who Are Also "Specially Interested" in *General Obligation* Bond Approval Elections.

1. The *Kramer* and *Cipriano* Holdings Analyzed.

On June 16, 1969, this Court decided two cases in which limitations on the franchise were questioned on the basis of denial of the equal protection of the laws guaranteed by the

Fourteenth Amendment to the United States Constitution, *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. Ed. 583, and *Cipriano v. City of Houma* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed. 2d. 647. This Court had previously recognized:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . . absent of course the discrimination which the Constitution condemns. *Lassiter v. Northhampton Community Board of Elections,* 360 U.S. 45, 50, 79 S.Ct. 985, 989, 3 L.Ed. 2d 1072 (1959).

The particular statutory provisions in *Kramer* and *Cipriano* were struck down, however, as authorizing discrimination which the Constitution condemns.

Both *Kramer* and *Cipriano* assumed, without deciding, that, in the words of *Cipriano*:

> "Whether the statute so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Cipriano* at 704, 89 S.Ct. at 1900, cf. *Kramer* at 632, 89 S.Ct. at 1892.

Kramer explained this latter qualification as follows:

> "In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal" *Kramer* at 632, 89 S.Ct. at 1892.

In a footnote, *Kramer* went on to observe:

> "Of course, if the exclusions are necessary to promote the articulated state interest, we must then determine whether the interest promoted by limiting the franchise constitutes a compelling state interest. We do not reach that issue in this case" footnote 14 at 632, 89 S.Ct. at 1892.

In *Kramer,* the New York legislature had articulated a state goal of limiting the franchise in school district board member

elections to those "primarily interested in school affairs." The limitations on the franchise were:

> "To be eligible to vote at an annual district meeting, an otherwise qualified district resident must either (1) be the owner or lessee of taxable real property located in the district, (2) be the spouse of one who owns or leases qualifying property, or (3) be the parent or guardian of a child enrolled for a specifed time during the preceding year in a local district school." *Kramer* at 623, 89 S.Ct. at 1887.

This Court held such limitations violative of the equal protection clause of the Fourteenth Amendment because:

> ". . . close scrutiny of the . . . classifications demonstrates that they do not accomplish the purpose with sufficient precision to justify denying appellant the franchise." *Kramer* at 632, 89 S.Ct. at 1892.

In *Cipriano,* the Louisiana legislature had articulated a state goal of limiting the franchise in municipal utility *revenue* bond approval elections to voters with a "special interest" by limiting the franchise to "taxpayers qualified to vote". The facts were that:

> "The *revenue* bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue." *Cipriano* at 705, 89 S.Ct. at 1900.

However;

> ". . . the benefits and burdens of the bond issue fall indiscriminately on property owners and non-property owners alike." *Cipriano* at 705, 89 S.Ct. at 1900.

This Court observed:

> "When, as in this case, the State's sole justification for the statute is that the classification provides a 'rational basis' for limiting the franchise to those voters with a 'special interest.' "

as a prelude to its holding that:

> "(because) the challenged statute contained a classifica-

tion which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote . . . the statute clearly does not meet the 'exacting standard of precision we require of statutes which selectively distribute the franchise' " *Cipriano,* at 706, 89 S.Ct. at 1900, citing *Kramer* at 632, 89 S.Ct. at 1892.

In both *Kramer* and *Cipriano,* then, the issue of whether the interest promoted by limiting the franchise constituted a compelling state interest was not met because the classifications of voters excluded were not tailored to achieve the articulated state goal. It is submitted that the issue of compelling state interest is before this Court in this case, however, because the classifications of voters excluded by Arizona law are tailored to meet the articulated state goal of limiting the franchise only to those qualified voters who are directly affected by the burden of repaying the debt.

2. ***Revenue*** **Bonds and** ***General Obligation*** **Bonds Distinguished.**

The lower court here found:

"Moreover, in the instant case we find no evidence which would justify a distinction between *Revenue* Bonds and *General Obligation Bonds.*" (page 3 of unreported opinion)

This finding was made despite the fact that the Arizona constitution provided that:

"Questions upon bond issues . . . . shall be submitted to the vote of real property tax payers who shall also in all respects be qualified electors." Constitution of Arizona, Art. 7, §13.

An Arizona statute provided that:

"After the bonds are issued, the governing board . . . . . shall annually levy and cause to be collected a tax . . . . . upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and

. . . . to redeem the bonds when they mature . . . ." A.R.S. 1959, §35-458.

The Arizona Supreme Court had interpreted the articulated state interest in making the franchise limitation and consequent exclusion as follows:

> "Undoubtedly the framers of our constitution had in mind by the enactment of this provision that the creation of indebtedness to be evidenced by bonds payable not in the immediate future but rather over a long period of years should only be with the consent of the majority of those whose property was to be obligated." *Ackerman v. Boyd,* 74 Ariz. 77, 244 P. 2d 351, 354.

As was carefully explained in the *Cipriano* case:

> ". . . *Revenue* bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue." at 705, 89 S.Ct. at 1900.

Conversely, *general obligation* bonds are financed either wholly or in part by property tax revenue.

> "While there is a paucity of judicial authorities on the subect, it was held by the Supreme Court of Oregon, in *City of Eugene v. Willamette Valley Co.,* 52 Ore. 490, 97 P. 817, 821, that the phrase *'general obligations'* means 'a municipal debt, for the payment of which provision must be made by devoting funds raised by taxation, thereby appropriating in discharge thereof a pro rata share of the burden upon all property in a specified district that is subect thereto.' No authorities have been cited to the contrary." *Baker Watts & Co. v. Saxon,* 261 F. Supp. 247, 252 (DDC 1966)

It is generally true that *general obligation* bonds can be marketed on terms more favorable to the issuing entity than *revenue* bonds.

It is recognized that there are many different methods of financing *general obligation* bonds. Those methods may range from those financed solely by property tax revenues to those intended to be financed entirely by revenues generated by

the operation of the utility involved, with the property tax resource being merely available to fall back on if the utility does not generate enough revenue (For example, see Brief for Salt Lake City, Utah, as Amicus Curiae, pages 17 and 18).

School districts, to say the least, have limited revenue generating resources. School district *general obligation* bonds, per se, must either be solely dependent on property tax resources or so largely dependent on property tax resources as to be effectively dependent thereon. As was stated in *Muench v. Pain*, ____ Ida. ____, 463 P.2d 939, 945-946 (1970):

> "It is apparent that the real property taxpayers have an interest in the outcome of school district bond elections substantially greater than other electors who are not also taxpayers or real property . . . . . Although non-property owners might feel the financial impact of a bond issue indirectly through increased rentals and prices in the economy and might have children attending the public schools, the effect of a bond issue upon the real property owner is to impose a lien upon his property for payment of the bonds."

See also *Settle v. City of Muskogee, et al.*, ____ Okla. ____, 462 P.2d 642, (1969), and *Settle v. Board of County Commissioners of the County of Muskogee*, et al., ____ Okla. ____, 462 P.2d 646 (1969).

3. School *General Obligation* Bond Approval Franchise Limitations in Colorado.

a. The State Interest in Exclusion Is Articulated.

The Colorado constitutional provision applicable to the School District's problem is as follows:

> "*Debt for school buildings - how created.*
>
> No debt by loan in any form shall be contracted by any school district for the purpose of erecting and furnishing school buildings, or purchasing grounds, unless the proposition to create such debt shall first be submitted to such

qualified electors of the district *as shall have paid a school tax therein,* in the year next preceding such election, and a majority of those voting therein shall vote in favor of incurring such debt." (emphasis added) *Colorado Constitution* - Article XI, Section 7.

This constitutional provision is supplemented by the following Colorado statutes:

"Bonded indebtedness - elections - districts of seventy thousand or less enrollment. (1) The board of education of any school district with a school enrollment of seventy thousand or less, at any regular biennial school election or at a special election called for the purpose, *may submit to the registered qualified taxpaying electors of the district the question of contracting a bonded indebtedness* for the purpose of purchasing grounds, or for erecting and furnishing school buildings, or for funding floating indebtedness, or for any one or more of said purposes, which purposes shall be broadly construed, subect to the limitations provided in section 123-11-4." (emphasis added) *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-3.

" 'Taxpaying elector' and 'qualified taxpaying elector' mean any person who is at least twenty-one years of age, a citizen of the United States, and who has resided in the state for twelve months, in the county for ninety days, in the school election precinct fifteen days immediately preceding the election at which he offers to vote, *and who, during the twelve months next preceding said election, has paid an ad valorem school tax upon property situated within the school district and owned by said person;* and the term 'registered qualified taxpaying elector' means a qualified taxpaying elector who has registered pursuant to the requirements of section 123-11-1." (emphasis added) *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-1. *Definitions.* Subsection (4)

" 'Ad valorem school tax' and 'general ad valorem school tax' mean only the general property tax, levied annually on real or personal property listed with the county assessor. No person shall be qualified as a taxpaying elector for the purpose of this article or article 12 of this chapter

by the payment of any one or more of the following taxes: Income tax, sales tax, use tax, excise tax, specific ownership tax on a motor vehicle or trailer, or any other tax which is not a general ad valorem school tax as defined in this subsection (5), and the generality of said definition shall never be restricted by the listing set forth in this subsection (5). *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-1. *Definitions.* Subsection (5)

Tax levy to pay principal and interest.

"(1) Whenever any school district shall have issued bonds under the provisions of this article, it shall be the duty of the board of county commissioners of the county in which said district is situated, at the time of levying other school district taxes, to levy a tax on all the taxable property of said district at a rate sufficient to produce such amount or amounts as shall have been certified by the board of education of said district, for the purpose of paying bonds not yet due, . . . *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-19.

School district indebtedness, therefore, can be created only by *general obligation* bonds. School district *general obligation* bonds can be repaid only from *ad valorem* school taxes levied on real or personal property.

b. The Voters Excluded Are Necessarily Excluded to Promote the Articulated State Interest.

The system of including only those eligible voters who will pay the tax which will pay the debt obviously conforms perfectly to the legislative intent of limiting the franchise to those who will bear the burden of the bond debt. See *Muench v. Pain*, ____ Ida ____, 463 P.2d 939 (1970); *Settle v. City of Muskogee, et al.*, ____ Okla ____, 462 P.2d 642 (1969); and *Settle v Board of County Commissioners of the County of Muskogee*, ____ Okla ____, 462 P.2d 646 (1969). The issue which defeated the New York and Louisiana statutes in *Kramer* and *Cipriano*, supra, therefore is met in Colorado and the issue not met in *Kramer* and *Cipriano* - i.e. whether the interest

promoted by limiting the franchise constitutes a compelling sate interest - must be reached.

4. The State Interest Promoted by Limiting the Franchise in *General Obligation* Bond Elections Is a Compelling State Interest.

This is the issue which should be reached in this case. The Poudre R-1 School District, as Amicus Curiae, leaves the argument on this issue to the parties themselves.

The School District is of the opinion, on the basis of the facts, and on the basis of the arguments presented by the parties in the lower court and in their briefs in this Court, that the position of the City of Phoenix et al., is correct - i.e. that the State of Arizona can limit the franchise in *general obligation* bond elections to qualified voters who are 'specially interested' in the election because of the direct burden of repaying the tax earmarked for the payment of the debt undertaken by the issuance of the bonds. There is a compelling state interest to protect those who will have a lien placed on their property for the payment of a tax from being told they will have that lien by others who will not have it. *Muench v. Pain,* supra, *Settle v. City of Muskogee,* supra, *Settle v. Board of County Commissioners of County of Muskogee,* supra.

B. The Judgment Below Should Not Be Given Retroactive Effect.

1. *Cipriano* Was Given Only Prospective Effect.

In *Cipriano,* This Court reasoned:

"Significant hardships would be imposed on cities, bondholders and other connected with municipal utilities if our decision today were given full retroactive effect . . . Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." at 706, 89 St. at 1900.

Based on this reasoning this Court held:

> "Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision." at 706, 89 S.Ct. at 1901.

Earlier in 1969, this Court had held that Section 5 of the Voting Rights Act of 1965, 79 St. 437, 42 USC §1973 et seq., required certain changes in state election laws be submitted to the United States Attorney General for approval or that an action for declaratory judgment be brought. This Court further held, however:

> "Appellants in the Mississippi cases have asked this court to set aside the elections conducted pursuant to these enactments and order that new elections be held under the pre-amendment laws. The Solicitor General has also urged us to order new elections if the State does not promptly institute §5 approval proceedings. We decline to take corrective action of such consequence, however. These §5 coverage questions involve complex issues of first impression — issues subect to rational disagreement. The state enactments were not so clearly subject to §5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or affect of these statutes, if any, has not been determined by any court. We give only prospective effect to our decision, bearing in mind that our judgment today does not end the matter so far as these States are concerned." *Allen v. State Board of Elections*, 393 U.S. 544, 571-572, 89 S.Ct. 817, 22 L.Ed. 2d 1, (1969).

2. If the Decision of the Lower Court Is Upheld.

The decision of the lower court was based on two alternative, mutually exclusive grounds. The first ground was that "we find no evidence which would justify a distinction between *Revenue* Bonds and *General Obligation* Bonds." (page 3 of

unreported opinion). The second ground was "There was no evidence before this Court which would justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest" (page 3 of unreported opinion)

a. On the "No Evidence Which Would Justify a Distinction Between *Revenue* Bonds and *General Obligation* Bonds" Issue.

The facts of this case might be viewed in such a way that the difference between the *revenue* bonds which were not financed in any way by property tax revenue in *Cipriano* and the *general obligation* bonds which are only partially financed by property tax revenue here are deemed to be differences without legal distinction. See also *Frank T. Stewart et al v. The Parish School Board of the Parish of St. Charles and School District No. 1 of the Parish of St. Charles,* (____ F Supp. ____ E D La, N O Div., No. 69-281 E, Section E, 1970). If this is the view taken, as was pointed out in the footnote in *Kramer,* the issue of compelling state interest need not be reached. *Kramer,* footnote 14 at 632, 89 S.Ct. at 1892.

If this is the view taken, this Court, logically, must also reiterate the assumption stated in both *Kramer* and *Cipriano* that:

> ". . . a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election" *Cipriano* at 704, 89 S.Ct. at 1900; *Kramer* at 632, 89 S.Ct. at 1892.

The Poudre R-1 School District submits that if the assumption might mean anything at all it would mean that a state could constitutionally limit the franchise in school *general obligation* bond elections to those qualified voters who alone will be burdened by the repayment of the debt. This is the exact situation in Colorado by state constitution and statutes.

The very least this Court should do, therefore, if it upholds the lower court on this limited factual ground, is to clearly compare the facts of this case to the facts of *Cipriano* and to clearly state the reasons why the facts here do not support a legal distinction of this case from *Cipriano*. In other words, this Court should so narrowly word its opinion here that the bonds approved in the Poudre R-1 School District are not adversely affected.

b. On the Compelling State Interest Issue.

If the issue of compelling state interest is reached, this Court necessarily must determine that there are real distinctions between *revenue* bonds and *general obligation* bonds and that such distinctions are apparent from the facts of this case. The decision here, therefore, will not be merely a decision made because of the binding effect of *Cipriano,* as held by the trial court on its second alternative ground. If this Court reaches the compelling state interest question, the decision here will be on complex issues of first impression, *Kramer* footnote 14, 395 U.S. at 632, 89 S.Ct. at 1892; issues subject to rational disagreement - witness the many amicus curiae briefs filed herein. See also *Muench v. Pain,* supra; *Settle v. City of Muskogee,* supra, *Settle v. Board of County Commissioners of the County of Muskogee,* supra; cf. *Stewart v. The Parish School Board of the Parish of St. Charles and School District No. 1 of the Parish of St. Charles,* supra.

3. There Is as Much Reason Here to Apply a Decision Upholding the Lower Court Prospectively Only as There Was in *Cipriano*.

Either because the facts here do not justify a distinction between the type of *general obligation* bond involved here and the type of *revenue* bond involved in *Cipriano* or because the issue of compelling state interest should be reached here, the reasons used in *Cipriano* to justify giving the decision there only prospective effect are just as applicable here.

If this case is decided on the basis that the facts do not justify a distinction between this case and *Cipriano,* the decision should be given only prospective effect for two reasons. First, the decision would not end the matter as to those jurisdictions with fact situations where a basis for distinction exists between *revenue* and *general obligation* bonds. Second, those other jurisdictions would not be so clearly subject to *Cipriano* as to constitute a deliberate defiance of its holding. *Allen v. State Board of Elections,* supra.

If the case here is decided on the compelling state interest ground, the decision should be given only prospective effect because the question involves a complex issue of first impression in this Court. Further, witness the many amicus briefs filed, the issues are subject to rational disagreement.

As to the manner of holding prospectively only, the *Brief For the Parish School Board of Caddo Parish, Louisiana, as the Governing Authority of Parish Wide School District of Caddo Parish, Louisiana, as Amicus Curiae,* is incorporated herein by this reference. It should be noted that the statement made therein concerning no Colorado statutory contest period (page 11) is not entirely accurate - at least insofar as school general obligation bond elections are concerned. *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-12(2). The inaccuracy, however, is unimportant in regard to the general argument of that brief.

V. CONCLUSION

The position of the Poudre R-1 School District is that, under Colorado law, the time for challenging the election result has expired and no challenge has been filed. The authorization to issue the securities is legally complete if a distinction is recognized between this case and the *Cipriano* case and the decision of this Court is either in favor of the City of Phoenix, et al., or, if against the City, it is given only prospective effect.

The Poudre R-1 School District, therefore, respectfully and specifically asks this Court to do any one of three alternative things in its decision in this case:

A. First, as a matter of compelling state interest, it asks this Court to hold that, because of the real and significant distinctions between *revenue* bonds and *general obligation* bonds, it is constitutionally permissible to limit the franchise in *general obligation* bond elections to those taxpaying electors who have to bear the burden of the lien encumbrance to secure the obligation to pay the debt of the bond; or,

B. Second, if it is not a matter of compelling state interest to limit the franchise to taxpaying electors, the School District asks this Court to make its decision prospectively effective only so as to remove the cloud from its voter approved bonds; or

C. Third, if the issue of compelling state interest is not reached, it asks this Court to base its decision on such clearly stated narrow factual grounds as to not adversely affect the *general obligation* school bonds approved in its district.

Respectfully submitted,

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) ss.
COUNTY OF LARIMER)

The undersigned, one of the counsel for Poudre School District R-1, Larimer County, Colorado, as Amicus Curiae, being first duly sworn upon oath deposes and says that a copy of the foregoing brief has been served on all counsel of record by depositing on this date copies thereof in the United States Air Mail, postage prepaid, addressed to each of them, at their respective addresses of record.

B. F. Napheys III

B. F. NAPHEYS III

Subscribed and sworn to before me this 25th day of March, 1970.

Tedra Wells

(Seal) TEDRA WELLS, Notary Public

My commission expires September 18, 1972.